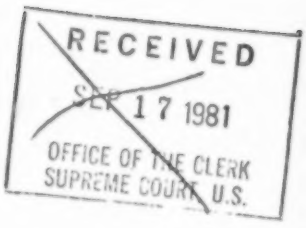
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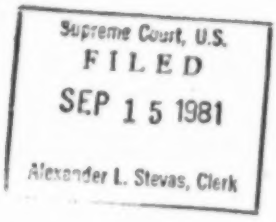
81-5408

IN THE
SUPREME COURT OF THE UNITED STATES



OCTOBER TERM, 1981

NO. _____



WARREN McCLESKEY,

Petitioner,

vs.

WALTER ZANT, Superintendent,
Georgia Disgnostic &
Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, STATE
OF GEORGIA

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

WARREN McCLESKEY,

Petitioner,

Versus

WALTER ZANT, Superintendent,
Georgia Disgnostic &
Classification Center,

Respondent.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Georgia death penalty statute as applied in this case contravenes the Eighth and Fourteenth Amendments to the United States Constitution by failing to provide guidelines to the jury with respect to its use of certain "aggravating circumstance" evidence, namely evidence of other acts of alleged criminal conduct by the petitioner.

II. Whether the imposition of the death penalty was in this case arbitrary and capricious in contravention of the Eighth and Fourteenth Amendments to the United States Constitution in that there is no rational way to distinguish this case from numerous other cases where the death penalty has not been imposed.

III. Whether a police detective's promises of a favorable recommendation on a pending escape charge, made to a key prosecution witness and not disclosed at petitioner's trial, contravenes the due process clause of the Fourteenth Amendment.

IV. Whether petitioner's due process rights were violated by the trial court's failure to grant petitioner's motion to proceed in forma pauperis and for expenses for expert testimony with

respect to the identity of the murder weapon.

V. Whether the trial court's charge to the jury with respect to the proof of intent necessary to show malice murder shifted the burden of pursuasion to the petitioner in contravention of the due process clause of the Fourteenth Amendment.

VI. Whether the prosecution's argument in the penalty phase regarding the appellate court's reduction of life sentences previously imposed against petitioner contravened the due process clause of the Fourteenth Amendment.

VII. Whether the petitioner was denied his Sixth Amendment rights by the failure of his trial counsel, inter alia, to interview witnesses, develop available defenses, move for a continuance, object to improper jury instructions, and prepare for the sentencing phase.

VIII. Whether the trial court's exclusion of two prospective jurors after only a brief examination of their views on capital punishment was contrary to Witherspoon v. Illinois and its progeny.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

WARREN McCLESKEY,

Petitioner,

Versus

WALTER ZANT, Superintendent,
Georgia Diagnostic &
Classification Center,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, STATE OF GEORGIA

Petitioner, WARREN McCLESKEY, prays that a Writ of Certiorari issue to the Superior Court of Butts County, State of Georgia, to review the judgment of that Court entered on April 8, 1981. The Supreme Court of Georgia denied the Petitioner's Application For A Certificate of Probable Cause to Appeal the decision of the Superior Court of Butts County on June 17, 1981.

CITATION TO OPINION BELOW

The opinion of the Superior Court for Butts County is unreported, but attached hereto as Appendix "A", pp. A-1 through A-23. The decision of the Supreme Court of Georgia denying the Application For A Certificate of Probable Cause is also unreported but attached hereto as Appendix "B."

JURISDICTION

The decision of the Superior Court of Butts County was entered on April 8, 1981 and the Application For A Certificate of Probable Cause to Appeal was denied by the Supreme Court of Georgia on June 17, 1981 (see Supreme Court of Georgia Order, attached hereto as Appendix "B").

This Court has jurisdiction pursuant to 28 U. S. C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which provide in relevant part:

SIXTH AMENDMENT.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses to his favor, and to have the Assistance of Counsel for his defence."

EIGHTH AMENDMENT.

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

FOURTEENTH AMENDMENT.

> . . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

This also involves provisions of the Georgia Death Penalty Statute including, inter alia, Ga. Code Ann. §27-2534.1:

> "(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any migigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: . .
> (2) the offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burgulary or arson in the first degree. . .
> (8) the offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

* * *

(c) the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in §27-2534.1(b) is so found, the death penalty shall not be imposed."

STATEMENT OF THE CASE

Petitioner, WARREN McCLESKEY, was indicted on June 13, 1978 for the murder of Frank Schlatt, an officer with the Atlanta Bureau of Police Services, during the course of a robbery of the Dixie Furniture Store in Atlanta. Petitioner was also indicted on two counts of armed robbery.

The charges against petitioner were tried before a jury on October 9-12, 1978 and he was convicted on all three counts. In a separate sentencing phase, the jury imposed the death penalty for the murder conviction and imposed two consecutive life sentences for the armed robbery conviction (Tr. 1031).

The Court ordered that petitioner be executed by electrocution on November 22, 1978 (Tr. 1036). His execution was then stayed pending appeal. McCleskey's conviction was appealed to the Supreme Court of Georgia which upheld his conviction and sentences on January 24, 1980.

The United States Supreme Court denied a Petition for Writ of Certiorari, McCleskey v. Georgia, ____ U. S. ____, 49 U. S. L. W. 3251 (1980). Subsequently, on December 19, 1980, the Superior Court of Fulton County set January 8, 1981 as the date for execution of the petitioner's death sentence. Petitioner then filed a Petition for a Writ of Habeas Corpus and moved for a stay of the execution of the death sentence, which stay the Superior Court of Butts County granted on January 5, 1981.

A hearing was held on Petitioner's Petition for a Writ of

Habeas Corpus on January 30, 1981. On April 8, 1981, the Superior Court of Butts County denied the Writ and an Application for a Certificate of Probable Cause to Appeal was filed in the Supreme Court of Georgia. That Application was denied on June 17, 1981.

Petitioner was convicted of murder on the State's theory that he was the trigger man in the robbery. The State did not introduce the murder weapon and no one testified that they saw petitioner shoot Officer Schlatt. In addition to certain testimony regarding the Dixie Furniture Store robbery, the State introduced evidence regarding two armed robberies which had occurred six weeks prior to the Dixie Furniture Store robbery (Tr. 673, et seq.; Tr. 884, et seq.). Although the the State contended that petitioner had participated in those robberies, he had been neither convicted nor indicted for those robberies. No instruction was given to the jury regarding what standard of proof the State bore in proving petitioner's participation in those robberies. During the course of the trial, the State also introduced evidence of prior convictions or guilty pleas of the petitioner for armed robberies which had occurred seven or eight years earlier (Tr. 1066-1078). Petitioner was cross-examined by the State regarding the details of each of the robberies which were the basis for the prior convictions or guilty pleas (Tr. 843-849).

At trial, the State presented testimony by five witnesses (other than petitioner's co-defendant) who stated that they saw petitioner participate in an armed robbery. Of these five witnesses, however, only two identified petitioner as a participant in the Dixie Furniture Store robbery. The other three witnesses testified to details of petitioner's alleged participation in other robberies not closely connected in time or place with the Dixie Furniture Store robbery.

The introduction of evidence of other robberies not closely related to the Dixie Furniture Store robbery was introduced

over the objection of defense counsel (Tr. 668-671). With respect to the introduction of such evidence, the Court gave the jury the following instruction at the time of its admission:

> "Ladies and Gentlemen, in the prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused, that is, the defendant in this case, has committed another transaction, wholly distinct, independent and separate from that for which he is on trial, even though it may show a transaction of the same nature, with similar methods, in similar locations, it is admitted into evidence for the limited purpose of aiding in identification and illustrating the state of mind, plan, motive, intent and scheme of the accused, if, in fact, it does to the jury illustrate those matters.
>
> Now, whether or not the defendant was involved in such similar transaction is a matter for you to determine, and the Court makes no intimation in that regard.
>
> Furthermore, if you conclude that the defendant now on trial was involved in a similar transaction or these similar transactions, you should consider it solely with reference to the mental state and intent of the defendant insofar as applicable to the charges in the indictment, and the Court in charging you this principle of law in no way intimates whether such transaction, if any tends to illustrate the intent or state of mind of the defendant. That is a question for the jury to determine, but this evidence is admitted for the limited purpose mentioned by the Court, and you will consider it for no other purpose except the purpose for which it is admitted. All right, proceed" (Tr. 673-674).

The Court repeated this charge almost verbatim in its instructions to the jury just prior to its deliberation with respect to petitioner's guilt (Tr. 992-993).

After the jury returned verdicts of guilty on all three counts, the Court gave the jury instructions regarding its sentencing deliberations. No instruction was given that the jury should disregard the "other acts" evidence presented at the trial. No instruction was given regarding what weight, if any, the jury should give to the evidence presented regarding other alleged acts of criminal conduct by the defendant. Rather, the Court instructed the jury that all the evidence

presented at the guilt phase could be considered at the sentencing phase. The verbatim instruction given to the jury was as follows:

> "In arriving at your determination of which penalty shall be imposed, you are authorized to consider all the evidence received here in court, presented by the State and the defendant throughout the trial before you" (Tr. 1028).

One of the other alleged robberies was offered for impeachment purposes (Tr. 884), and at the time of its introduction, the Court gave a cautionary instruction (Tr. 885). No cautionary or limiting instruction regarding the use of such evidence was given as part of the general instructions to the jury prior to deliberating either as to guilt or the sentence. The broad general instruction which was given regarding the use of evidence of other criminal acts (supra, at 4-5), invited the jury to use this evidence for purposes other than those for which it was offered.

At trial, the defendant testified and on direct examination the fact of prior armed robbery convictions was elicited (Tr. 805A). On cross-examination, the State offered copies of prior indictments and convictions (Exhibits S-32 - S-35); (Tr. 1066-1078). The State also examined petitioner in detail regarding the acts which were the basis for those prior convictions seven to eight years prior to the Dixie Furniture Store robbery (843-849).

The Georgia death penalty scheme does not require any instruction to the jury if the jury determines to use evidence of other alleged acts of criminal conduct as aggravating circumstances for imposition of the death penalty. No instruction of any kind was given to the jury as to when it would be appropriate to consider evidence of other alleged acts of criminal conduct as aggravating circumstances which would justify imposition of the death penalty.

The State also introduced into evidence the testimony of Offie Gene Evans, a prisioner and informant, who testified

regarding an alleged confession by petitioner which he elicited from petitioner while both were incarcerated at the Fulton County Jail (Tr. 869-871). This statement had not been provided to petitioner prior to trial, and petitioner denied making any such confession (Tr. 826-34).

At the State Habeas Corpus Hearing, this same witness admitted that promises had been made to him by a City of Atlanta detective with respect to a recommendation for lenient treatment for an escape charge which was then pending against Evans if he were to give favorable testimony in the McCleskey case. Such a promise had not been made known to the jury at the time of the McCleskey trial.

Evidence also introduced at the State Habeas Corpus Hearing showed that the pre-1973 pattern of imposing death sentences exists in Georgia after 1973 particularly with respect to the imposition of death penalty in cases involving police officers as victims. The pattern which the evidence shows is that the death penalty had been imposed only when a black male has been convicted of shooting a white officer while on duty.

Each of the Federal claims raised here were raised in the Habeas Complaint filed in the Superior Court of Butts County (see Petition for a Writ of Habeas Corpus, for a Stay of Execution, and for Leave to Proceed In Forma Pauperis, filed January 5, 1981). Each of the Federal grounds raised herein was rejected by the Court in its Order of April 8, 1981, attached hereto as

REASON FOR ALLOWANCE OF THE WRIT.

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, NAMELY, WHETHER THE GEORGIA DEATH PENALTY SCHEME, AS ADMINISTERED IN THIS CASE, CONTRAVENES THE EIGHTH AND FOURTEENTH AMENDMENTS BY FAILING TO PROVIDE ANY GUIDELINES TO THE JURY WITH RESPECT TO USE OF EVIDENCE REGARDING POSSIBLY AGGRAVATING CIRCUMSTANCES.

This case raises important Eighth and Fourteenth Amendment questions regarding the imposition by the jury of a

death sentence without guidelines regarding the use of possibly aggravating circumstance evidence. At petitioner's trial, the State introduced (in both documentary and testimonial form) evidence regarding two armed robberies which had occurred six weeks prior to the Dixie Furniture Store robbery (Tr. 676, et seq.; Tr. 884, et seq.). Although the State contended that petitioner had participated in those robberies, he had been neither convicted nor indicted for them. No instruction was given to the jury regarding what standard of proof the State bore in proving petitioner's participation in those robberies. During the course of trial, the State also introduced evidence of prior convictions or guilty pleas of the petitioner for armed robberies which had occurred seven or eight years earlier (Tr. 1066-1078). Petitioner was cross-examined by the State regarding the details of each of the robberies which were the basis for the prior convictions or guilty pleas (Tr. 843-849).

This Court has recently recognized that the due process clause imposes restrictions upon state evidentiary rules in the context of capital felony trials. Green v. State of Georgia, ___ U. S. ___, 60 L. Ed. 2d 738 (1979).

It has long been the rule in the Anglo-American jurisprudence that the state should not introduce evidence of other acts of criminal conduct of the accused to prove a predisposition for crime. 1 Wigmore Evidence, ¶55-57; McCormick On Evidence, 2d Ed., §190; "Other Crimes at Trial," 70 Yale Law Journal, 763 (1961). Georgia has, until relatively recent time, followed this common law rule. However, in recent years, the Georgia Courts have moved away from this tradition to the point where evidence of independent crime or alleged crime is admitted freely. This change in the Georgia rule is traced by former Justice Ingram of the Georgia Supreme Court in his dissent in Hamilton v. State, 239 Ga. 72, at 77-78 (1977):

> "I dissent to the judgment of the Court in this case primarily because, without

> expressly saying so, the majority has greatly weakened the doctrine of Bacon v. State, supra . . .I cannot honestly say that this jury was not significantly influenced by the illegal admission of this evidence of an independent crime. If you doubt that the Bacon doctrine is being eroded, read the following cases. Cf. Rosborough v. State, 209 Ga. 362(2)(72 S.E.2d 717) (1954); Howard v. State, 211 Ga. 186(3)(84 S.E.2d 455) (1954); Wilson v. State, 212 Ga. 412(2)(93 S.E.2d 354) (1956); Wood v. State, 224 Ga. 121(5)(160 S.E.2d 368) (1968) with Campbell v. State, 234 Ga.130 (214 S.E.2d 656) (1975); Allamson v. State, 235 Ga. 584(1)(221 S.E.2d(3) (1975); and Fears v. State, 236 Ga. 660(1)(225 S.E.2d 4) (1976). These cases show a remarkable trend, in my judgment, towards the liberal admission into evidence of independent crimes. If this is to be the new rule, why not just say, boldly and plainly, that the barrier has been lifted and defendants will now be tried on their record irrespective of any connection with the alleged crime on trial."

This broad Georgia rule regarding admissibility of other acts evidence contravenes Eighth and Fourteenth Amendment standards when the death penalty is imposed. Presnell v. Georgia, 439 U. S. 14, 16 (1978); Gardner v. Florida, 430 U. S. 349 (1977); Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973, at 989 (1978). This Court should grant the writ to determine the important question regarding the constitutionality of the admission of such evidence without standards to the jury regarding its use.

A separate and related question is the propriety of the jury's use of this cumulative evidence of other acts or alleged acts of criminal conduct as aggravating circumstances for imposition of the death penalty. The instructions given to the jury at the guilt phase of the trial, rather than restrictively limiting the jury in its use of this evidence, invited the jury to use it for any purpose it saw fit. The failure to properly limit the exercise of the jury's discretion in the sentencing phase is contrary to the heartof the Supreme Court's decision in Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 858, n. 47 (1976)("Where the ultimate punishment of death is at issue, a system of standardless jury discretion violates the Eighth and Fourteenth Amendments"); Godfrey v. Georgia, ___ U. S. ___, 64 L. Ed. 2d 398 (1980). In Godfrey, the Court made clear that in

order to meet constitutional requirements:

> "It, [the State] must channel the sentencers' discretion by 'clear and objective standards'[5/] that provide 'specific and detailed guidance,'[6/] and that 'make rationally reviewable the process for imposing a sentence of death.'"[7/]
>
> [5/] Gregg v. Georgia, supra, 428 U.S., at 198, quoting Coley v. State, 231 Ga. 834, 204 S.E. 2d 612 (1974).
>
> [6/] Profitt v. Florida, supra, 428 U. S., at 253 (Opinion of Stewart, Powell, and Stevens, JJ.)
>
> [7/] Woodson v. North Carolina, supra, 428 U. S., at 303 (Opinion of Stewart, Powell, and Stevens, JJ.)

64 L. Ed. 2d at 398.

The standardless instruction to the jury in this case permitted the jury to use the evidence of other criminal acts in a matter that is simply a "subject of sheer speculation" just as was the jury's interpretation of the statutory language found defective in Godfrey, supra. While the Georgia statutory scheme upheld in Gregg, supra, expressly limits imposition of the death penalty to a jury finding of a statutorily-defined aggravating circumstance, the jury in this case was not instructed to assure that it was not motivated by aggravating factors such as petitioner's prior convictions or his alleged participation in other criminal acts for which he has not been indicted or convicted, which are not a part of the statutory scheme.

The Georgia practice is also inconsistent with the rule adopted by three other state courts in interpreting the Furman requirements in their death penalty schemes. State v. McCormick, 397 N. E. 2d 276 (Indiana, 1979); Cozzlino v. State, 584 S. W. 2d 765 (Tennessee, 1979); Elledge v. State, 346 So. 2d 998 (Florida, 1977).

Therefore, the Court should grant the writ to decide this important Federal question which has been subject to varying interpretations by the State Courts.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE GEORGIA DEATH PENALTY STATUTE AS APPLIED HAS RESULTED IN THE IMPOSITION OF THE DEATH PENALTY IN AN ARBITRARY, CAPRICIOUS, AND WHIMSICAL FASHION IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The evidence before the Habeas court showed the arbitrary and capricious manner in which the death penalty was imposed in this case. The evidence introduced showed that the pre-1973 pattern of imposing death sentences in Georgia (and found unconstitutional under Furman v. Georgia, 408 U. S. 238, 33 L. Ed 2d 346 (1972)) is the same pattern existing after 1973. (See Petitioner's Habeas Proceeding, Exhibit "1"). Although a number of Atlanta Police Officers were killed, non-accidentally, during duty hours both prior to and subsequent to 1973, the death penalty has been imposed only freakishly. The only situations where the death penalty has been applied have involved white victims being killed by black actors.

Nor has the review of death sentence imposition by the Georgia Supreme Court acted to assure that the pre-1973 arbitrary and capricious nature of the imposition of the death sentence has been ended under the current statute. A brief review of the cases relied upon by the Georgia Supreme Court to support its conclusion that the death penalty was not imposed in an arbitrary fashion shows that, to the contrary, the death penalty in this case is arbitrary, in that there is no way to explain why here, and not in other cases.

Of the thirteen cases reviewed by the Georgia Supreme Court and relied upon as a basis for non-arbitrariness, (see Appendix, 245 Ga., at 116-17), four cases[1/] were cases wherein the death penalty was overturned on the basis of Furman v.

1/ Johnson v. State, 226 Ga. 378 (1970); Callahan v. State, 229 Ga. 737 (1972); Whitlock v. State, 230 Ga. 700 (1973); Bennette v. State, 231 Ga. 458 (1973).

Georgia, supra. Of the remaining cases, the bulk of them involved cases with evidence distinguishing them from the routine murder case in which the death penalty has not been imposed. For example, in at least three cases, the victim was shot while fleeing the scene. Fleming v. State, 240 Ga. 142 (1977); Willis v. State, 243 Ga. 185 (1979); Collier v. State, 244 Ga. 553 (1979). In another, one victim's skull was beaten in, leaving her features unrecognizable; and a butcher knife was buried deep in her chest. Another victim, a woman suffering partial paralysis from a stroke, was injured and left alone, where police found her several days later. The defendant later laughed about what he had done. Bowden v. State, 239 Ga. 821 (1977). Pulliam v. State, 236 Ga. 460 (1976) involved a case where a cab driver was shot during a premeditated robbery scheme that included plans to shoot the driver. One other case relied upon by the Georgia Supreme Court, Dobbs v. State, 236 Ga. 427 (1976) involved the murder of a grocery store operator who was shot while he lay helpless on the floor, with a witness begging that he be spared. And, finally, Callahan v. State, 229 Ga. 737 (1972) involved the murder of an Atlanta Police Officer who was stomped unconscious prior to the shooting.

Nothing presented to the jury in the case at hand was along the lines of these cases. Nothing in the statutory scheme of the Court's instructions to the jury gave the jury guidance as to when it was appropriate to impose a death sentence, and when it was not appropriate to impose a death sentence.

The standards for assessing the imposition of the death penalty are set forth in Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 859, at 883 (1976):

> "While Furman did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be

> inflicted in an arbitrary and capricious manner. Mr. Justice White concluded that 'the death penalty is exacted with great infrequency even for the most artrocious crimes and. . .there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.' 408 U. S., at 313, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (concurring). Indeed, the death sentences examined by the Court in Furman were 'cruel and unusual in the same way that being struck by lighting is cruel and unusual. For all of the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in Furman were] among a capriciously selected random handful upon which the sentence of death has in fact been imposed. . .[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Id., at 309-310, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (Stewart, J., concurring).

The arbitrary and capricious application of the death penalty in this case is akin to that found unconstitutional by the Court in Godfrey v. State of Georgia, ___ U. S. ___, 64 L. Ed. 2d 398 (1980). There, the Supreme Court held unconstitutional, as applied, the death penalty imposed because "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey, 64 L. Ed. 2d at 409.

The Supreme Court in Godfrey, supra, further stated:

> "A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.' Id., at 188, 49 L. Ed. 2d 859, 96 S. Ct. 2909, quoting Furman v. Georgia, supra, 408 U. S. at 313, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (White, J., concurring.
>
> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious inflinction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.' Gregg v. Georgia, supra, 428 U. S. , at 196, n. 47, 49 L. Ed. 2d 859, 96 S. Ct. 2909. See also Profitt v. Florida, 428 U.S. 242, 49 L. Ed. 2d 913. 96 S. Ct. 2960; Jurek v. Texas, 428 U. S. 262, 49 L. Ed. 2d 929, 96 S. Ct. 2950. It must channel the sentencer's discretion by 'clar and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' As was made clear in Gregg, a

> death penalty 'system could have standards so vague that they would fail adequately to channel, the sentencing decision patterns juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur.' 428 U.S., at 195, n. 46, 49 L. Ed. 2d 859, 96 S. Ct. 2909.
>
> In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible, and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of the §(b)(7)'s terms. In fact, the jury's interpretation of §(b)(7) can only be the subject of sheer speculation.
>
> The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court. Under state law that court may not affirm a judgment of death until it has independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance. Ga. Code Ann. §27-2537 (c)(2)."

Godfrey, at 406-07.

The Godfrey principles are aplicable to the case herein. There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.

The Court should grant certiorari to decide this important Federal question.

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE STATE'S FAILURE TO DISCLOSE AN UNDERSTANDING BETWEEN A KEY PROSECUTION WITNESS AND A POLICE DETECTIVE REGARDING A FAVORABLE RECOMMENDATION THAT WOULD BE MADE ON PENDING ESCAPE CHARGES IN EXCHANGE FOR HIS COOPERATION CONTRAVENED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Superior Court of Butts County found in the habeas proceedings below that the State, through an Atlanta Police Detective, had made a promise with one of the key prosecution

witnesses to make a favorable recommendation on a pending criminal charge against the witness in exchange for his testimony in petitioner's trial (Habeas Transcript, 122; April 8, 1981 Order, at p. 7). Evidence of this prior promise to the key government witness was not revealed to the jury at petitioner's trial.

This Court should grant the writ for certiorari to review the question whether a police detective's promise such as the one made in this case triggers the protection of Giglio v. United States, 405 U. S. 150, 31 L. Ed. 2d 104 (1972). The State Court in this proceeding concluded that Giglio was not implicated because only a police detective was involved in making the promise.

This conclusion of the State Court is contrary to decisions of the Federal Courts of Appeals on the same matter. Freeman v. State of Georgia, 599 F. 2d 65 (5th Cir. 1979); Williams v. Brown, 609 F. 2d 216 (5th Cir. 1980); Smith v. Florida, 410 F. 2d 1349 (5th Cir. 1969); Schneider v. Estelle, 552 F. 2d 593 (5th Cir. 1977); United States v. Sutton, 524 F. 2d 1239 (4th Cir. 1979).

The Court should grant the petition to resolve this conflict in authority on this important Federal constitutional question.

IV. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS AND FOR EXPENSES FOR EXPERT TESTIMONY WITH RESPECT TO THE IDENTITY OF THE MURDER WEAPON.

Prior to trial, counsel for the petitioner moved to proceed in forma pauperis and for the appointment of experts and an investigator to aid in the preparation of the case. The Fulton County Superior Court denied the motion.

Special need existed in this case, and the petitioner suffered special harm by the Court's denial of the motion. More than 100 witnesses were listed by the State, an unusual number which would require substantial efforts by the defense to

interview. Further, there was considerable question about the State trial expert's conclusion that the murder weapon (never recovered by the police) was a .38 Rossi. In his deposition taken for the habeas hearing, the expert acknowledged the substantial chances that the murder weapon was something other than a .38 Rossi (Fite Deposition, pp. 4-7).

There was, then, special need for the appointment of both an investigator and a ballistics expert.

The evidence left unpursued by defense counsel raises substantial doubt regarding the State's theory of the crime. The habeas court's order which concluded that "it is doubtful that such testimony [that of the expert]could have sufficiently refuted the totality of the evidence against petitioner" (Order, at 10), is error. The unpursued evidence might well have created a reasonable doubt in the minds of the jurors - that is the test, not whether the evidence could refute the totality of the evidence.

The denial of the motion for expert funds in this case is contrary to this Court's decision in Little v. Streater, ___ U. S. ___, 68 L. Ed. 2d 627 (1981). The Court should grant certiorari to consider the scope of the Court's holding in Little v. Streater, supra, within a criminal trial context.

V. THE COURT SHOULD GRANT THE WRIT TO CONSIDER THE CONSTITUTIONALITY OF THE TRIAL COURT'S CHARGE WITH RESPECT TO PRESUMPTIONS ON INTENT.

The trial court charged the jury with respect to the "intent" necessary for proof of malice murder as follows:

> "Now, in every criminal prosecution, ladies and gentlemen, criminal intent is a necessary and material ingredient thereof. To put it differently, a criminal intent is a material and necessary ingredient in any criminal prosecution.
>
> I will now try to explain what the law means by criminal intent by reading you two sections of the criminal code dealing with intent, and I will tell you how the last section applies to you, the jury.
>
> One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed

to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted."

Because this charge to the jury regarding intent could have been understood by the jury to cast upon the petitioner the burden of producing suffucient rebuttal evidence to carry the burden of persuasion regarding intent, the charge contravened the due process clause of the Fourteenth Amendment. Sandstrom v. Montana, 442 U. S. 510, 61 L. Ed. 2d 39 (1979); Mullaney v. Wilbur, 421 U. S. 684, 44 L. Ed. 2d 508 (1975).

The State Court below rejected applicable Fifth Circuit authority with respect to the unconstitutionality of this charge to the jury. In Tyler v. Phelps, 622 F. 2d 172, vacated on other grounds 643 F. 2d 1095, the Fifth Circuit recently found constitutionally infirm a charge similar to the one at issue in this case. Tyler, 643 F. 2d at 1099, (5th Cir. 1981).

The Court should grant the petition for writ of certiorari to resolve this important question of Federal constitutional law.

VI. THE COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER THE PROSECUTOR'S ARGUMENT TO THE JURY REGARDING THE EFFECT OF POST-CONVICTION APPEALS UPON LIFE SENTENCES IMPOSED BY A PRIOR JURY CONTRAVENES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In the prosecutor's closing remarks to the jury, the Assistant District Attorney asked the jurors to keep in mind when they deliberated during the penalty phase the fact that in the appellate process the applicant had previously succeeded in having a life sentence reduced to 15 years (Tr. 1019-1020). Petitioner submits that this argument to the jury contravened his Sixth and Fourteenth Amendment rights. The clear implication to the jury was that it should impose the death penalty in this case so as to avoid the possibility that, like the prior life sentences, the sentences in this case would be reduced.

The integrity of the jury's deliberative processes was destroyed by this argument. Their solemn duty as jurors

to decide upon the penalty in this case was tainted by the prosecutor's suggestion that if they were to impose a life sentence as opposed to a death penalty, appellate processes would reduce that sentence even further.

The Court should grant the petition for a writ of certiorari.

VII. THE COURT SHOULD GRANT THE WRIT BECAUSE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN CONTRAVENTION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

The record of the habeas corpus trial court below is replete with evidence of ineffective assistance of counsel by petitioner's trial counsel. Prior to trial, defense counsel contacted none of the State witnesses despite the fact that the State listed over 100 potential witnesses on its May-Call List. The State called 24 witnesses at trial, none of whom had been interviewed by defense counsel. He contacted none of the store employees who were eye-witnesses to the robbery; nor did he contact any of the investigating police officers.

Although defense counsel admitted at the habeas hearing that he recognized there were two possible defenses for his client (i.e., an alibi defense, and alternatively, that his client was not the triggerman), he failed to take any steps to secure the available testimony of at least four witnesses whose testimony would have case substantial doubt on the State's evidence that McCleskey was the triggerman.

Although defense counsel had the opportunity to review the District Attorney's Investigative File prior to trial, he took advantage of that opportunity only on the Thursday afternoon prior to the commencement of the Monday morning trial. Counsel for co-defendants who were put to trial a month later had all viewed the file long before counsel for the petitioner; in fact in some cases as much as two and one-half months earlier that petitioner's counsel.

An earlier review of the District Attorney's Investigative file would have put counsel on notice of such witnesses

as the State Crime Lab Expert who eventially testified at trial regarding the possible identity of the murder weapon. Defense counsel did not interview the State's expert prior to trial.

Defense counsel also admitted at the State Habeas Hearing that he was taken by surprise by the testimony of two of the State's key witnesses - one of them a witness who changed her identification testimony at the time of trial and the other being the key witness referred to, supra, Part III, who testified regarding an alleged admission of guilt by the petitioner.

Defense counsel's representation of petitioner at trial also fell far below constitutional standards. (1) Counsel did not object to the trial court's instruction to the jury which was contrary to the standards of Mullaney v. Wilbur, supra (Part V, supra); (2) Counsel did not object to the District Attorney's argument which directed the jury to focus its attention on the appellate processes which had reduced petitioner's prior life sentences (Part VI, supra); (3) Counsel failed to develop on cross-examination of one of the prosecution's key witnesses any information regarding promises made to the witness by the Atlanta Police Officers (Part III, supra); (4) Counsel failed to move for a continuance and/or mistrial to permit the development of adequate evidence regarding the line-up procedure which occurred in the court room on the morning that the trial commenced, although he admitted he had been taken by surprise by evidence of the line-up procedure, and the testimony of a number of witnesses was based on that highly suggestive line-up procedure; (5) Counsel failed to move to exclude evidence obtained from a search warrant executed on May 30, 1978, seeking evidence regarding material taken from the robbery that had occurred more than two and a half months prior to the execution of the search warrant.

Over and above these substantial failures in trial, defense counsel failed to provide effective assistance in the sentencing phase of the trial. Affidavits introduced at the Habeas Hearing showed the existence of a substantial number of character

witnesses who were prepared to testify on petitioner's behalf at trial. None of these witnesses were called by the defense counsel; indeed, trial counsel failed to take any reasonable steps to identify witnesses who could testify on petitioner's behalf. With respect to petitioner himself testifying at the sentencing phase, no advance preparation was made by defense counsel.

Defense counsel's conduct contravened established constitutional standards. Powell v. Alabama, 287 U. S. 45 (1932); Gideon v. Wainwright, 373 U. S. 335 (1963); Davis v. Alabama, 596 F. 2d 1214, at 1217 (5th Cir.1979); Rummel v. Estelle, 590 F. 2d 103 (5th Cir. 1979); Friedman v. United States, 588 F. 2d 1010 (5th Cir. 1979); Gaines v. Hopper, 575 F. 2d 1147 (5th Cir. 1978); Bell v. Georgia, 554 F. 2d 1360 (5th Cir. 1977); Brown v. Blackburn, 625 F. 2d 35 (5th Cir. 1980).

The records make approriate, then, the grant of the petition for writ of certiorari to consider the constitutional question of the denial of ineffective assistance of counsel in this capital felony case.

VIII. WHETHER THE TRIAL COURT'S EXCLUSION OF TWO PROSPECTIVE JURORS, AFTER ONLY A BRIEF EXAMINATION REGARDING THEIR VIEWS ON CAPITAL PUNISHMENT, CONTRAVENED WITHERSPOON AND ITS PROGENY.

The trial court excluded two prospective jurors because of their statements that they were conscientiously opposed to capital punishment. Their exclusion came after only a brief examination regarding their views with respect to imposition of the death penalty. No where in the examination did either prospective juror state her inability to set her convictions aside and do her duty as a citizen. Nor did either juror state what effect the state's request for the death penalty would have upon their deliberations with respect to guilt. Neither of the excused jurors was asked whether her convictions regarding the death penalty would effect her ability to abide by her oath as a juror.

The evidence upon which the Court excluded the jurors was inadequate; the Court's failure to inquire further before excluding both jurors was error under Witherspoon v. Illinois, 391 U. S. 510, 20 L. Ed. 2d 776 (1968). The Court of Appeals for the Fifth Circuit has so held in Burns v. Estelle, 592 F. 2d 1297 (5th Cir. 1979, approved en banc, 626 F. 2d 396 (5th Cir. 1980).

As a result of the trial court's action, petitioner's jury did not constitute a representative cross-section of the community and it was incapable of reflecting contemporary community attitudes regarding the appropriateness of the penalty of death in petitioner's case. Further, petitioner's trial jury was unrepresentative and biased in favor of the prosecution on the issue of petitioner's guilt or innocence.

This Court should grant the petition for a writ of certiorari to review this important unsettled question.

CONCLUSION.

Because this case presents important unsettled questions of Federal constitutional law, the Court should grant the Petition for a Writ of Certiorari to the Superior Court of Butts County.

Respectfully submitted,

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APPENDICES

Appendix A -- Order of Superior Court of Butts County, April 8, 1981, Denying Habeas Corpus Relief.....A-1 to A-23

Appendix B -- Order of Supreme Court of Georgia Denying Petitioner's Application For Certificate of Probable Cause to Appeal, June 17, 1981.....B-1

Appendix C -- Order of Supreme Court of Georgia Denying Petitioner's Direct Appeal, January 24, 1980.....C-1 to C-10

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WARREN MCCLESKEY,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	CASE NO. 4909
	:	
WALTER ZANT, SUPERINTENDENT GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death sentence by the Superior Court of Fulton County. McCleskey was convicted of Murder and two Armed Robberies. He was sentenced to death for Murder and to life imprisonment for each Armed Robbery. His convictions and sentences were affirmed by the Supreme Court. McClesky v. State, 245 Ga. 108 (1980). Certiorari was denied by the Supreme Court of the United States.

The Petition, as amended, contains 36 numbered paragraphs, 23 of which allege substantive claims for relief (10-27; 29-31; 36-36). The Court will rule on those paragraphs containing claims for relief by paragraphs corresponding numerically to the paragraphs in the Petition.

The record in this habeas case consists of the transcript of proceedings before this Court on January 30, 1981; the affidavits of Mrs. Emma Owens, Marie Lamar, Thomas Adger, Mrs. Thomas Adger, Myrtle Bates, Dr. William J. Bowers, Kelly Fite, and Russell Parker; the discovery file of the prosecution; and the transcript and record of Petitioner's trial in Fulton County Superior Court commencing on October 9, 1978.

10.

In Paragraph 10, Petitioner claims that the death penalty is applied arbitrarily, capriciously, and whimsically in the State of Georgia and thus violates his constitutional rights.

In support of his contention, Petitioner has submitted the affidavit of William J. Bowers, sociologist and co-author of a study on the administration of capital punishment in Georgia. The Court has considered the evidence but declines to adopt Dr. Bowers' conclusion that the death penalty is applied in an arbitrary and discriminatory fashion. The proffered study does not take into account the myriad circumstances and unique characteristics of both offenses and defendants which provide impetus for sentences imposed.

The Georgia capital statute has been declared constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The Georgia Supreme Court has already reviewed Petitioner's death sentence

and found it was not imposed under the influence of passion, prejudice or any other arbitrary factor. McClesky v. State, supra at 115. Further, the Court found the sentence was not disproportionate considering the crime and the defendant. Id.

Accordingly, the allegation in Paragraph 10 is found to be without merit.

11.

In Paragraph 11, Petitioner complains that the death sentence in Georgia is being exacted pursuant to a pattern and practice of Georgia officials to discriminate on the grounds of race, sex, and poverty in violation of Petitioner's constitutional rights.

The Court is not persuaded by the report of Dr. Bowers. Accordingly, the allegation in Paragraph 11 is found to be without merit.

12.

In Paragraph 12, Petitioner alleges that the death penalty is an excessive penalty which fails to serve any rational and legitimate social interests.

The Court is not persuaded by the report of Dr. Bowers. Accordingly, this allegation is found to be without merit.

13.

In Paragraph 13, Petitioner contends the death sentence is cruel and unusual punishment in light of all factors relating to the offense and the offender.

The Supreme Court has already decided this point

adversely to Petitioner. McClesky v. State, supra, at 115. Accordingly, the allegation in Paragraph 13 is found to be without merit.

14.

In Paragraph 14, Petitioner complains of constitutional deprivation due to imposition of the death sentence stemming from allegedly unfair proceedings.

The Georgia capital sentencing structure has been declared constitutional. Gregg v. Georgia, supra. Accordingly, this allegation is found to be without merit.

15.

In Paragraph 15, Petitioner claims he was denied his Sixth, Eighth, and Fourteenth Amendment rights because the jury that convicted him did not constitute a representative cross-section of the community. Specifically, Petitioner contends that two jurors were excused without cause because of their opposition to the death penalty.

The Court has examined the voir dire examination of jurors Weston (T. 96-99) and Cason (T. 128-130). The relevant portions are as follows:

> "Q Now, Miss Weston, are you conscientiously opposed to capital punishment?
>
> A Yes.
>
> Q Your opposition towards capital punishment, would that cause you to vote against it regardless of what the facts of the case might be?

A Yes, I would say so, because of the doctrine of our church. We have a manual that we go by.

Q Does your church doctrine oppose capital punishment?

A Yes.

Q So you would oppose the imposition of capital punishment regardless of what the facts would be?

A Yes.

Q You would not even consider that as one of the alternatives?

A No, I wouldn't.

(T. 97-98).

Q Mrs. Cason, are you conscientiously opposed to capital punishment?

A Yes.

Q You are?

A Yes.

Q If you had two alternatives in a case as far as penalties go, that is, impose the death sentence or life penalty, could you at least consider the imposition of the death penalty?

A I don't think so, no. I would have to say no.

Q Under any circumstances would you consider it?

A No."

(T. 129-130).

Both jurors indicated they could not impose the death penalty, regardless of what facts might emerge

in the course of the trial. Thus, they were properly excluded under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

The allegation in Paragraph 15 is found to be without merit.

16.

The Petitioner in Paragraph 16 charges that the jury which convicted and sentenced him was biased in favor of the prosecution.

The Supreme Court of the United States has already rejected this "prosectuion prone" argument in Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). See also Douthit v. State, 239 Ga. 81, 87 (1977); Hawes v. State, 240 Ga. 327(5)(1977).

Accordingly, this allegation is found to be without merit.

17.

In Paragraph 17, Petitioner claims harm from the trial court's failure to instruct jurors with conscientious and/or religious scruples against capital punishment to subordinate their personal views rather than said jurors being excused.

The Court has concluded that said jurors were properly excused. (See Paragraph 15). Accordingly, this allegation is found to be meritless.

18.

In Paragraph 18, Petitioner contends his constitutional rights were violated by the intoduction of his post-arrest statement given after an allegedly illegal arrest.

There is no evidence to suggest Petitioner's arrest was illegal. Additionally, the Supreme Court has already decided Petitioner's statement was properly admitted. McClesky v. State, supra, at 112(3). Accordingly, this allegation is found to be without merit.

19.

See Paragraph 18.

20.

In Paragraph 20, Petitioner alleges violation of his constitutional rights because of the State's failure to disclose its arrangement with an informer who testified at Petitioner's trial. More specifically, Petitioner claims that the testimony of Offie Evans was given in exchange for a promise from an Atlanta Police Bureau detective that he would give a favorable recommendation for Evans who had federal escape charges pending.

Mr. Evans at the habeas hearing denied that he was promised anything for his testimony. (H.T. 122). He did state that he was told by Detective Dorsey that Dorsey would "speak a word" for him. (H.T. 122). The detective's ex parte recommendation alone is not sufficient to trigger the applicability of Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). See Tamplin v. State, 235 Ga. 20(2)(1975).

The prosecutor at Petitioner's trial, Russell J. Parker, stated that he was unaware of any understandings between Evans and any Atlanta Police Department detectives regarding a favorable recommendation to be made on Evans' federal escape charge. (Parker Deposition, p. 9). Mr. Parker admitted that there was opportunity for Atlanta detectives to put in a good word for Evans with federal authorities. (Id., p. 19). However, he further stated that when any police officer has been killed and someone ends up testifying for the State, putting his life in danger, it is not surprising that charges, like those against Evans, will be dropped. (Id.).

In the absence of any other evidence, the Court cannot conclude an agreement existed merely because of the subsequent disposition of criminal charges against a witness for the State. See Fleming v. State, 236 Ga. 434, 438 (1976).

Accordingly, the allegation in paragraph 20 is found to be without merit.

21.

In Paragraph 21, Petitioner alleges that his Fourteenth Amendment rights were violated by the State's deliberate withholding of a statement made by Petitioner to Offie Evans.

This claim has already been decided adversely to Petitioner. McClesky v. State, supra, at 112 (4). Therefore, the allegation is found to be without merit.

22.

In Paragraph 22, Petitioner claims he was denied his Sixth and Fourteenth Amendment rights by the trial court's failure to grant his Motion to proceed in forma pauperis and for funds to employ experts to aid in his defense. Specifically, Petitioner complains of harm from the lack of an investigator and of a ballistics expert.

Petitioner charges that the need for an investigator became more critical when the State served him with an additional list of 96 "may call" witnesses approximately three weeks prior to trial. Defense Counsel Turner testified at the habeas hearing that the list was for all three defendants (H.T. 31) and the State did not call all of them. (H.T. 40). Further, Counsel went over the list with Petitioner to learn whether Petitioner knew any of the witnesses or what their testimony could be. (H.T. 34).

It is clear that defense counsel had access to the prosecution's discovery file which included statement from all witnesses (except Evans) and investigative reports (H.T. 38; Parker Deposition, p. 4) and Georgia State Crime Laboratory reports (see Discovery File). While an investigator may have been helpful, the Court cannot conclude Petitioner was harmed by the failure of the trial court to appoint an investigator, especially in light of Petitioner's defense that he was not even present at the robbery. (H.T. 57; 58).

As to a ballistics expert, the State's witness, Kelly Fite, testified that the murder weapon was probably a .38 Rossi, but no weapon was ever recovered or introduced at trial. (H.T. 44-45). Mr. Fite stated that his opinion was based on an accumulation of data for several years plus a check with the F.B.I. record file in Washington. (Fite Deposition, p. 4). Mr. Fite also stated that only two other type weapons were possibilities. (Id., Even if another expert had testified, it is doubtful that such testimony could have sufficiently refuted the totality of evidence against Petitioner.

The appointment of expert witnesses lies within the discretion of the trial court. Westbrook v. State, 242 Ga. 151 (1978); Crenshaw v. State, 244 Ga. 430 (1979). Denial of the Motion for the appointment of experts will not be reversed in the absence of an abuse of that discretion. Patterson v. State, 239 Ga. 409 (1977); Westbrook v. State, supra.

Here, Petitioner demonstrated no special need for the appointment of an investigator, nor did Petitioner request the appointment of a ballistics expert. In the absence of any evidence of abuse, the trial court's decision not to grant Petitioner's Motion appears to be a proper one.

Accordingly, the allegation in Paragraph 22 is found to be without merit.

23.

In Paragraph 23, Petitioner claims that a highly

suggestive line-up occurred prior to the commencement of his trial which violated his Sixth Amendment rights.

This issue has already been decided adversely to Petitioner. McClesky v. State, supra, at 110(2). Petitioner has presented no new evidence to indicate that the Supreme Court's conclusion was in error.

Accordingly, this allegation is found to be without merit.

24.

In Paragraph 24, Petitioner argues that the jury instructions concerning intent impermissibly shifted the burden of persuasion to Petitioner in violation of his Fifth and Fourteenth Amendment rights.

The relevant portion of the jury charge is as follows:

> "Now, in every criminal prosecution, ladies and gentlemen, criminal intent is a necessary and material ingredient thereof. To put it differently, a criminal intent is a material and necessary ingredient in any criminal prosecution.
>
> I will now try to explain what the law means by criminal intent by reading you two sections of the criminal code dealing with intent, and I will tell you how the last section applies to you, the jury.
>
> One section of our law says that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound

mind and discretion is presumed to intend the natural and probable consequences of his acts, but both of these presumptions may be rebutted.

I charge you, however, that a person will not be presumed to act with criminal intention, but the second code section says that the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.

Now, that second code section I have read you has the term the trier of facts. In this case, ladies and gentlemen, you are the trier of facts, and therefore it is for you, the jury, to determine the question of facts solely from your determination as to whether there was a criminal intention on the part of the defendant, considering the facts and circumstances as disclosed by the evidence and deductions which might reasonably be drawn from those facts and circumstances. "

(T. 996-997).

The jury instruction in this case clearly indicates that the presumption could be rebutted so that the presumption created was merely a permissive one. Such permissive presumptions have been held valid. Skine v. State, 244 Ga. 520 (1978); Moses v. State, 245 Ga. 180 (1980). Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), is readily distinguished on the

ground that the jury "were not told that the presumption could be rebutted...." 61 L.Ed.2d at 46.

Accordingly, the allegation in Paragraph 24 is found to be without merit.

25.

Petitioner charges in Paragraph 25 that the prosecution impermissibly referred to the appellate process in his argument during the sentencing phase in contravention of Petitioner's constitutional rights.

The relevant portion of the prosecutor's argument is set out in the Appendix. (See Appendix).

Ga. Code Ann. §27-2206 prohibits counsel in a criminal case from arguing before a jury that a defendant, if convicted, may not be required to suffer the full penalty imposed because of the possibility of executive clemency. Here, the prosecution used the talismanic words "appellate process", but it was in reference to a prior life sentence Petitioner had gotten reduced, not to the possibility that a life sentence could be reduced if the jury decided to impose such a sentence. Since the words referred to a past conviction, the Court cannot conclude that the words had the inevitable effect of encouraging the jury to attach diminished consequence to their verdict and take less than full responsibility for determining life or death, an effect found improper in Prevatte v. State, 233 Ga. 929(6)(1975).

The prosecution may argue for a death sentence and offer plausible reasons for his position. Chenault v. State, 234 Ga. 216 (7)(1975); Street v. State, 237 Ga. 307, 315 (1976); Gates v. State, 244 Ga. 587, 595 (1979). Here, the remarks of the prosecutor appear to be within the bounds of proper argument.

Accordingly, the allegation in Paragraph 25 is found to be without merit.

26.

In Paragraph 26, Petitioner alleges that the trial court improperly admitted evidence of other robberies of which Petitioner had not been convicted and without adequate jury instructions which violated Petitioner's rights to due process of law.

The Supreme Court has already decided the issue of admissibility adversely to Petitioner. McClesky v. State, supra, at 114(b). In deciding that issue, the Court also noted that the trial court had charged the jury as to the limited purpose for which the similar crimes were admitted. In that the trial court cautioned the jury as to the limited purpose for which the acts were admitted at the time of admission (T. 673-674; 885) and repeated the same cautionary instruction in the jury charge at the end of the guilt/innocence phase (T. 992-993), the Court does not find Petitioner's rights were contravened in any way.

Accordingly, this allegation is found to be without merit.

27.

In Paragraph 27, Petitioner claims violation of his rights guaranteed by the due process clause by the alleged overly-broad instructions regarding the use which the jury could make of the evidence of / Petitioner's other acts in the guilt phase.

See Paragraph 26.

This allegation is found to be without merit.

29. [sic]

In Paragraph 29, Petitioner charges that the Georgia appellate review process denies him effective assistance of counsel, a fundamentally fair hearing and reliable determination of life or death, and the basic tools to prepare an adequate defense because of his indigency.

The Georgia capital sentencing structure has been declared constitutional. Gregg v. Georgia, supra.

Accordingly, this allegation is found to be without merit.

30.

Petitioner claims in Paragraph 30 that the means by which the death penalty will be administered will inflict wanton and unnecessary torture upon him in violation of his Eighth and Fourteenth Amendment rights.

The Georgia death statute has been declared constitutional. Gregg v. Georgia, supra.

Accordingly, this allegation is found to be without merit.

31.

In Paragraph 31, Petitioner claims that he was denied effective assistance of counsel in violation of his constitutional rights.

At trial and on appeal, Petitioner was represented by John M. Turner. Mr. Turner has been serving as Assistant District Attorney in Fulton County since January 8, 1981. (H.T. 24). Prior to joining that staff, Mr. Turner was in private practice for appoximately five years (H.T. 24), a practice which consisted of roughly 80% criminal work wherein he tried approximately 30 murder cases (H.T. 82). Prior to entering private practice, Mr. Turner served as Assistant United States Attorney in the Northern District of Georgia for two years. (H.T. 24). He was retained to represent Petitioner a few days after Petitioner was initially arrested, about one week before Petitioner's preliminary hearing. (H.T. 26).

The Court has reviewed the evidence and found the following allegations to be without merit:

1. Counsel failed to contact witnesses. Mr. Turner testified at the habeas hearing that he had had fairly extensive pretrial conversations with the prosecutor and had discussed a good bit of the information contained in the prosecutor's discovery file. (H.T. 29-30). He also had access to the discovery file which contained the statements of all witnesses except Offie Evans (H.T. 34) and had an agreement with the prosecution to obtain copies of actual statements of witnesses for cross-examination

purposes. (H.T. 88). Mr. Turner testified that he did not interview any employees of the Dixie Furniture Store prior to trial because he had opportunity to cross-examine the three employees who testified at the preliminary hearing (H.T. 35) and that the other employees who testified at trial gave testimony peripheral to the main issue and Petitioner's defense at that point was that he was not at the store during the robbery. (H.T. 37). Counsel did not interview investigative officers because he had full access to their investigative reports contained in the prosecution's discovery file. (H.T. 37). Further, Counsel went over the witness list with Petitioner to see whether Petitioner knew any of the people or the type testimony they could give. (H.T. 34). Finally, Counsel asked Petitioner for the names of alibi witnesses, and Petitioner responded with one nickname of a person with whom he had been unable to get in touch. (H.T. 89).

Decisions on which witnesses to call, whether and how to conduct cross-examinations, and all other strategies and tactical decisions are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (o975). In light of all the above factors, the Court cannot conclude Counsel was ineffective merely because he did not physically pursue witnesses. Accordingly, this allegation is without merit.

2. Counsel failed to seek a continuance when necessary to prepare adequately for trial.

Counsel testified that he had "fairly extensive" contact with Petitioner prior to both the preliminary hearing and trial, meeting with Petitioner well over a dozen times, three times prior to the preliminary hearing. (H.T. 27). He also stated that from his extensive discussions with the prosecution, he had a "pretty good grasp of the facts." (H.T. 43). He also said that although he looked at the prosecution's discovery file only once, he got everything he needed. (H.T. 88).

Effectiveness is not measured by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1968); Jones v. State, 243 Ga. 820 (1979). In addition, the issue of whether counsel should have moved for a continuance and for mistrial after an alleged suggestive line-up occurred on the morning Petitioner's trial began constitutes the kind of hindsight which has never provided the basis for ineffective assistance claims. MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

3. Counsel failed to object to improper instructions to the jury.

The Court has concluded that the jury instructions were neither burden-shifting (see Paragraph 24) nor overly-broad (see Paragraph 27). Petitioner's claim is meritless.

4. Counsel failed to object to improper arguments to the jury.

The Court has concluded that the prosecutor's remarks were not improper (see Paragraph 25). Petitioner's claim is meritless.

5. Counsel failed to prepare adequately and present evidence at the sentencing phase.

Counsel testified that prior to trial, he went over Petitioner's background with him, schools he had attended, who he knew. (H.T. 80). He also asked Petitioner if he had any witnesses or anyone to testify as to his character. He also discussed the same matters with Petitioner's sister, who declined to testify and told Counsel that her mother was not able to testify. (H.T. 80). Counsel also testified that Petitioner refused to testify in his own behalf during the sentencing phase. (H.T. 94).

Petitioner presented conflicting evidence to the extent that Petitioner's sister testified she was not asked to testify or to provide the names of potential character witnesses (H.T.136-137). Petitioner also presented the affidavits of five persons who indicated they would have testified for Petitioner had they been asked.

Despite the conflicting evidence on this point, however, the Court is authorized in its role as fact finder to conclude that Counsel made all inquiries necessary to present an adequate defense during the sentencing phase. Indeed, Counsel could not present

evidence that did not exist.

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering effective assistance. MacKenna v. Ellis, supra; Pitts v. Glass, supra.

Petitioner's trial counsel easily meets this test. He was experienced in the trial of criminal cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner. Counsel's testimony shows him to have been an intelligent and concerned defense lawyer. The effort he put forth for Petitioner was certainly reasonably effective within the meaning of the standard.

Accordingly, the allegations in Paragraph 31 are found to be without merit.

35.

In Paragraph 35, Petitioner complains that the introduction of his statements made to Offie Evans were elicited in a situation created to induce Petitioner to make incriminating statements in violation of his Sixth Amendment right to counsel.

The Supreme Court has already decided that the testimony of Evans was properly admitted. McClesky v. State, supra, at 112(4). This Court has concluded that there was no arrangement made for the testimony of Evans. (See Paragraph 20). Petitioner has presented no evidence tending to show that his statements were elicited in violation of his Sixth Amendment rights.

Accordingly, this allegation is found to be without merit.

36.

Petitioner claims in Paragraph 36 that the evidence upon which he was convicted was insufficient to show his guilt beyond a reasonable doubt in violation of his constitutional rights.

The Supreme Court has already decided that the evidence supports the finding of aggravating circumstances, the finding of guilt, and the sentence of death beyond a reasonable doubt. McClesky v. State, supra, at 115.

Accordingly, this allegation is found to be without merit.

WHEREFORE, all allegations in the Petition having been found without merit, the Petition is denied.

This 8th day of April, 1981.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

APPENDIX

Now, what should you consider as you are deliberating the second time here, and I don't know what you are going to consider.

I would ask you, however, to consider several things. Have you observed any remorse being exhibited during this trial by Mr. McClesky? Have you observed any remorse exhibited while he was testifying?

Have you observed any repentence by Mr. McClesky, either visually as you look at him now or during the trial or during the time that he testified? Has he exhibited to you any sorrow, both visually or during the time that he was testifying?

Have you seen any tears in his eyes for this act that he has done?

I would also ask you to consider the prior convictions that you have had with your in the jury room, and particularly the one where he got three convictions. I believe if you look at those papers carefully you are going to find, I think, on one of those he got three life sentences to begin with, and then there is a cover sheet where apparently that was reduced to what, eighteen years or fifteen years or something, which means, of course, he went through the appellate process and sorehow it got reduced.

Now, I ask you to consider that in conjunction with the life that he has set for himself.

You know, I haven't set his goals, you haven't

set his goals, he set his own goals, and here is a man that's served considerable periods of time in prison for armed robbery, just like Ben Wright said, you know, that is his profession and he gets in safely, takes care of the victims, although he may threaten them, and gets out safely, that is what he considers doing a good job, but of course you may not agree with him, but that is job safety.

I don't know what the Health, Education and Welfare or whatever organization it is that checks on job safety would say, but that is what Mr. Ben Wright considers his responsibility.

Now, apparently Mr. McClesky does not consider that his responsibility, so consider that. The life that he has set for himself, the direction that he has set his sails, and thinking down the road are we going to have to have another trial sometime for another peace officer, another corrections officer, or some innocent bystander who happens to walk into a store, or some innocent person who happens to be working in the store who makes the wrong move, who makes the wrong turn, that makes the wrong gesture, that moves suddenly and ends up with a bullet in their head?

(T. 1019-1020).

Application No. 1648

SUPREME COURT OF GEORGIA

ATLANTA, June 17, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WARREN McCLESKEY V. WALTER ZANT, SUPT.

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

35529. McCLESKY v. THE STATE.

UNDERCOFLER, Presiding Justice.

Warren McClesky appeals his convictions of murder and two armed robberies. He was sentenced to death for murder and life imprisonment for each armed robbery, all sentences to run consecutively.

Summary of Facts

From the evidence presented at trial, the jury was authorized to find the following facts:

On the morning of May 13, 1978, appellant, using his car, picked up Ben Wright, Bernard Dupree and David Burney. All four had planned to rob a jewelry store in Marietta that day. After Ben Wright went into the store to check it out, they decided not to rob it. All four then rode around Marietta looking for another place to rob but couldn't find anything suitable. They drove to Atlanta and

decided on the Dixie Furniture Store as a target. Each of the four was armed. Appellant had a .38 caliber Rossi nickel-plated revolver, Ben Wright carried a sawed-off shotgun, and the two others had blue steel pistols. Appellant parked his car up the street from the furniture store, entered the store, and "cased" it. After appellant returned to the car, the robbery was planned. Executing the plan, appellant entered the front of the store and the other three came through the rear by the loading dock. Appellant secured the front of the store. The others rounded up the employees in the rear and began to tie them up with tape. All the employees were forced to lie on the floor. The manager was forced at gunpoint to turn over the store receipts, his watch and six dollars. George Malcom, an employee, had a pistol taken from him at gunpoint. Before all the employees were tied up, Officer Frank Schlatt, answering a silent alarm, pulled his patrol car up in front of the building. He entered the front door and proceeded approximately fifteen feet down the center aisle where he was shot twice, once in the face and once in the chest. The chest shot glanced off a pocket lighter and lodged in a sofa. That bullet was recovered. The head wound was fatal. The robbers fled. Sometime later, appellant was arrested in Cobb County in connection with another armed robbery. He confessed to the Dixie Furniture Store robbery, but denied the shooting. Ballistics showed that Officer Schlatt had been shot by a .38 caliber Rossi revolver. The weapon was never recovered but it was shown that the appellant had stolen such a revolver in the robbery of a Red Dot grocery store two months earlier. Appellant admitted the shooting to a co-defendant and also to a jail inmate in the cell next to his, both of whom testified for the state.

Enumerations of Error

1. In his first enumeration of error, appellant contends the death penalty violates the due process and equal protection provisions of the state and federal constitutions because prosecutorial discretion permits its discriminatory application. Appellant's argument is without merit. Gregg v. Georgia, 428 U. S. 153 (1976); *Moore v. State*, 240 Ga. 807 (243 SE2d 1) (1978), cert. den.,

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— U.S. — (99 SC 268, — LE2d —) (1978).

2. Appellant's second enumeration of error complains that the prosecutor conducted an illegal post-indictment lineup immediately prior to trial without the knowledge, consent, or presence of defense counsel. However, a review of the record does not support this contention. The record shows that four witnesses immediately prior to the call of the case saw the appellant and four other persons sitting in the jury box guarded by deputy sheriffs. Each of these witnesses testified that they recognized the appellant as one of the robbers at the time they saw him seated in the jury box. There is no indication that the witnesses were asked to view the men seated in the jury box and see if they recognized anyone. No one pointed out the appellant as the defendant in the case, rather it is apparent from the witnesses' testimony that each recognized the appellant from having viewed him at the scene of the respective robberies. Therefore, no illegal post-indictment lineup occurred. See *Prater v. State*, 148 Ga. App. 831 (253 SE2d 223) (1979).

Appellant argues further that the four witnesses viewing him in the jury box as he awaited trial along with police identification procedures impermissibly tainted the witnesses' in-court identification of the appellant.

The threshold inquiry is whether the identification procedure was impermissibly suggestive. Only if it was, need the court consider the second question: whether there was a substantial likelihood of irreparable misidentification. *Gravitt v. State*, 239 Ga. 709 (239 SE2d 149) (1977); *Heard v. State*, 149 Ga. App. 92 (253 SE2d 453) (1979).

The chance viewing of the appellant prior to trial as he sat with others was no more suggestive than seeing him in the hall as he and other defendants are being brought in for trial, or seeing him seated at the defense table as each witness comes in to testify. We conclude that the chance viewing of the appellant immediately prior to trial by four of the state's witnesses was not impermissibly suggestive. Also, we find the identifications were not tainted by police identification procedures. Nevertheless, we have inquired into and find the identifications reliable.

Classie Barnwell, an employee of the Dixie Furniture

Store testified that the appellant was the man who came in the front door and participated in the robbery. This witness had been exposed to photographic lineups on two occasions and had seen the appellant's picture in the paper. However, she testified that she did not recognize any pictures as being the robbery suspect. There is no evidence that the appellant's picture was in any of the photographic lineups. She testified further that although the newspaper picture looked familiar, it was "vague" and she could not recognize the appellant from it. She was able to identify the appellant in person and was certain of her in-court identification. There is no evidence that the photographic identification procedure used by the police with this witness was impermissibly suggestive. The newspaper picture may have been suggestive. However, the question is whether under the "totality of the circumstances" the witness was irrevocably committed to the desired identification by the identification procedure used. *Heyward v. State*, 236 Ga. 526 (224 SE2d 383) (1976). Here the victim based her in-court identification testimony upon her observation of the appellant for some five to ten minutes during the robbery. Her identification of the appellant had an independent basis other than the viewing of a newspaper photograph that only looked familiar to her. See *Burrell v. State*, 239 Ga. 792 (239 SE2d 11) (1977). In our opinion, her identification testimony was reliable and admissible.

David Ross viewed the appellant in a series of black and white photographs and another series of color photographs. He was able to identify the appellant from the color photographs but not from the black and white. There is no showing that the array of photographs exhibited to this witness was impermissibly suggestive. *Heyward v. State*, supra. This witness saw but did not recognize the picture of the appellant published in the newspaper. He was also one of four witnesses who saw the appellant in the jury box immediately prior to trial. He testified he recognized the appellant from having seen him as he walked past him immediately prior to the robbery of the Red Dot grocery store. His in-court identification of the appellant had an independent basis other than the photographs and was properly submitted to

the jury. See *Burrell v. State*, supra.

Two other witnesses made in-court identifications of the appellant after identifying him from a photographic lineup. However, each witness testified that the identifications were based on the presence of the appellant at the robbery scene. *Burrell v. State*, supra. Their testimony was properly submitted to the jury.

We note that other evidence also establishes the reliability of this identification testimony, particularly a co-defendant's testimony and the appellant's own statement. Appellant's related enumerations of error (e.g., the trial court's overruling of appellant's motion for new trial), are without merit.

3. In his third enumeration of error, appellant argues that the trial court erred in overruling his motion to suppress his statement because it was not given freely and voluntarily. We find no error in the trial court's determination that the confession was given freely and voluntarily. *Johnson v. State*, 233 Ga. 58 (209 SE2d 629) (1974); *Amadeo v. State*, 243 Ga. 627 (255 SE2d 718) (1979); *Burney v. State*, 244 Ga. 33 (1979).

4. Appellant's fourth enumeration of error urges that the trial court erred in allowing evidence of appellant's oral statement admitting the murder made to an inmate in the next cell, because the prosecutor had deliberately withheld such statement in answering a Brady motion.

The appellant confided to a fellow inmate that he had shot the police officer. The inmate's name and address was included in the list of witnesses furnished to defense counsel. He testified for the state and was subjected to a thorough cross examination. *Hamby v. State*, 243 Ga. 339 (253 SE2d 759) (1979). The prosecutor showed the defense counsel his file, but did not furnish this witness' statement. The defendant in a criminal case has no right to inspect the prosecutor's file, but the district attorney upon proper motion may be required to disclose evidence that might be helpful to the defendant. *Strong v. State*, 232 Ga. 294 (206 SE2d 461) (1974) and cits. The test is whether the evidence was so important that the failure to disclose prevented the accused from receiving a constitutionally guaranteed fair trial. *Carter v. State*, 237 Ga. 617 (239

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SE2d 411) (1976). Here, the evidence which was not disclosed prior to trial would not exculpate the appellant, nor would it lessen his criminal liability. The appellant has not shown material prejudice and was not denied a fair trial under Brady v. Maryland, 373 U. S. 83 (1963). The evidence he sought to inspect was introduced to the jury in its entirety, and a favorable inference, if any, could be drawn by the jury. *Tarpkin v. State*, 236 Ga. 67 (222 SE2d 364) (1976). Appellant's argument that the evidence was needed in order to prepare a proper defense or impeach other witnesses has no merit because the evidence requested was statements made by the appellant himself. *Tarpkin v. State*, supra.

5. In his fifth enumeration of error, the appellant complains that he was denied due process because the prosecutor deliberately failed to disclose impeaching evidence concerning the testimony of Mamie Thomas. Mamie Thomas was an employee of the Dixie Furniture Store and was present during the robbery. She testified at the appellant's commitment hearing that the appellant was not the perpetrator. After discussing her testimony with her employer and a detective she admitted her testimony at the commitment hearing was false and that she failed to identify the appellant at that time out of fear for her personal safety. At some time prior to the trial she elected to come forward and tell the truth. At trial, the prosecutor called this witness without informing the defense counsel that she would admit she perjured herself at the commitment hearing and that she would testify that the appellant was the perpetrator.

We point out that this is not an instance of the prosecutor failing to correct testimony knowing it to be false. See Napue v. Illinois, 360 U. S. 264 (1959). The prior impeaching statement was put before the jury on direct examination by the prosecutor and therefore any favorable evidence was made available to the jury. *Tarpkin v. State*, supra. Defense counsel knew of the prior impeaching statement and used it to impeach the witness during cross examination. See *Rini v. State*, 235 Ga. 60 (218 SE2d 811) (1975). Appellant has failed to show material prejudice and therefore his fifth enumeration of error is without merit.

6. Appellant argues in his last enumeration of error that the trial court erred in admitting evidence of appellant's prior criminal acts. We do not agree. The state introduced evidence that the defendant had participated in two prior armed robberies. At one of these robberies, the robbery of the Red Dot grocery, the appellant obtained a gun of the same caliber and make as that which killed Officer Schlatt. These crimes were committed within two months prior to the case under review. Positive identification of the appellant was made as to all the crimes. There was evidence showing similar circumstances common to all three crimes from which the jury could have determined that the appellant participated in a continuing scheme to commit multiple armed robberies in order to support himself. There was a logical connection between the crime being reviewed and the prior crimes. *Collins v. State*, 239 Ga. 45 (235 SE2d 523) (1977). The conditions of admissibility set forth in *French v. State*, 237 Ga. 620 (229 SE2d 410) (1976) were satisfied. The trial court charged the jury as to the limited purpose for which these similar crimes were being admitted — that is to show the appellant's scheme, motive, intent or design — a purpose for which our decisions recognize an exception to the general rule against admissibility of evidence of other criminal activity. Code Ann. § 38-202; *Clemson v. State*, 239 Ga. 357 (236 SE2d 663) (1977); *Thomas v. State*, 239 Ga. 734 (238 SE2d 888) (1977); *Booker v. State*, 242 Ga. 773 (251 SE2d 518) (1979); *Burgess v. State*, 242 Ga. 889 (252 SE2d 391) (1979); *Hamilton v. State*, 239 Ga. 72 (235 SE2d 515) (1977).

Sentence Review

The jury found the following aggravating circumstances and sentenced the appellant to death for murder.

1. The offense of murder was committed while the offender was engaged in the commission of another capital felony. Code Ann. § 27-2534.1 (b) (2).

2. The offense of murder was committed against any police officer, corrections employee or fireman while engaged in the performance of his official duties. Code Ann. § 27-2534.1 (b) (8).

As required by Ga. L. 1973, p. 159 et seq. (Code Ann. § 27-2537 (c) (1-3)), we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, the evidence concerning the crime, and the defendant pursuant to the mandate of the statute. We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

We find that the evidence factually substantiates and supports the finding of the aggravating circumstances, the finding of guilt, and the sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, — U.S. — (99 SC 2781, 61 LE2d 560) (1979).

Appellant's co-defendant, David Burney, was sentenced to life imprisonment while another co-defendant received a twenty-year sentence. (See *Burney v. State*, 244 Ga. 33 (1979)). The question is presented whether appellant's sentence is disproportionate considering the crime and the defendant in light of the lesser sentences imposed on the co-defendants.

There is not a simplistic rule that a co-defendant may not be sentenced to death when another co-defendant receives a lesser sentence. *Collins v. State*, 243 Ga. 291 (253 SE2d 729) (1979). Each case is evaluated on its unique factual circumstance.

We find distinctions between appellant's case and the cases of the other co-defendants. First, the appellant was the actual perpetrator of the murder, whereas the other co-defendants were not, and in fact were not even in the immediate area of the killing. Second, one defendant co-operated with the authorities and testified against his co-defendants. See *Baker v. State*, 243 Ga. 710 (257 SE2d 192) (1979). Juries under similar circumstances have sentenced the "triggerman" to death while the same penalty has not been imposed on co-defendants. These cases have been affirmed by this court. *Bowden v. State*, 239 Ga. 821 (238 SE2d 905) (1977); *Pulliam v. State*, 236 Ga. 460 (224 SE2d 8) (1976); *Dobbs v. State*, 236 Ga. 427 (224 SE2d 3) (1976); *Ross v. State*, 233 Ga. 361 (211 SE2d 356) (1974).

We find that appellant's sentence to death is not excessive or disproportionate to the penalty imposed in

the cases of his co-defendants.

We have thoroughly reviewed the instructions of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1978), and *Hawes v. State*, 240 Ga. 327 (240 SE2d 833) (1978).

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the appendix support affirmance of the death penalty.

This was a murder of a police officer, committed while the appellant was engaged in an armed robbery. Appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

Judgment affirmed. Nichols, C. J., Jordan, Hill, Bowles and Marshall, JJ., and Judge Charles L. Weltner, concur. Clarke, J., not participating.

ARGUED NOVEMBER 19, 1979 — DECIDED JANUARY 24, 1980.

Murder, etc. Fulton Superior Court. Before Judge McKenzie.

John Milton Turner, Jr., for appellant.

Lewis R. Slaton, District Attorney, H. Allen Moye, Assistant District Attorney, Arthur K. Bolton, Attorney General, Nicholas G. Dumich, Staff Assistant Attorney General, for appellee.

APPENDIX.

Johnson v. State, 226 Ga. 378 (174 SE2d 902) (1970); *Callahan v. State*, 229 Ga. 737 (194 SE2d 431) (1972); *Whitlock v. State*, 230 Ga. 700 (198 SE2d 865) (1973); *Bennett v. State*, 231 Ga. 458 (202 SE2d 99) (1973); *Ross v. State*, 233 Ga. 361 (211 SE2d 356) (1974); *Dobbs v. State*, 236 Ga. 427 (224 SE2d 3) (1976); *Pulliam v. State*, 236 Ga. 460 (224 SE2d 8) (1976); *Spencer v. State*, 236 Ga. 697 (224 SE2d 910) (1976); *Bowden v. State*, 239 Ga. 821 (238 SE2d 905) (1977); *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1977); 243 Ga. 120 (252 SE2d 609) (1979); *Willis v. State*, 243 Ga.

185 (253 SE2d 70) (1979); *Jones v. State*, 243 Ga. 820 (256 SE2d 907) (1979); *Collier v. State*, 244 Ga. 553 (1979).

Opposition

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NO. 81-5408

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WARREN McCLESKEY,

Petitioner,

v.

WALTER ZANT, SUPERINTENDENT,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY,
STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER OR NOT PETITIONER'S EIGHTH OR FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED, AND HIS DEATH PENALTY UNCONSTITUTIONALLY IMPOSED AS A RESULT OF THE INTRODUCTION INTO EVIDENCE OF HIS PRIOR CRIMINAL CONVICTIONS FOR ARMED ROBBERY, AND BY THE INTRODUCTION OF TESTIMONY PERTAINING TO PETITIONER'S PARTICIPATION IN OTHER ARMED ROBBERIES FOR WHICH HE HAD NOT BEEN CONVICTED WHEN SAID EVIDENCE AND TESTIMONY WAS PROPERLY ADMISSIBLE UNDER GEORGIA LAW, AND WHEN THE TRIAL COURT'S INSTRUCTIONS, TAKEN AS A WHOLE, LIMITED THE JURY'S CONSIDERATION OF SAME.

II. WHETHER OR NOT PETITIONER'S DEATH PENALTY CAN BE SAID TO BE ARBITRARY OR CAPRICIOUS WHEN THERE WAS AMPLE EVIDENCE PRESENTED AT PETITIONER'S TRIAL TO SHOW THE EXISTENCE OF STATUTORY AGGRAVATING CIRCUMSTANCES UNDER GA. CODE ANN. § 27-2534.1(b) BEYOND A REASONABLE DOUBT, AND WHEN THE GEORGIA SUPREME COURT HAS REVIEWED PETITIONER'S CASE, FINDING IT NEITHER TO BE INFLUENCED BY PASSION, PREJUDICE OR OTHER ARBITRARY FACTOR NOR DISPORTIONATE, CONSIDERING THE CRIME COMMITTED AND THE INDIVIDUAL DEFENDANT.

III. WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN PETITIONER HAS FAILED TO MAKE A SUFFICIENT SHOWING OF AN UNDISCLOSED PROMISE OF LENIENCY MADE BY POLICE DETECTIVE TO AN INFORMANT WHO TESTIFIED AT PETITIONER'S TRIAL, AND WHEN BOTH THE STATE PROSECUTOR AND THE WITNESS HAVE TESTIFIED THAT THERE WERE NO PROMISES OR RECOMMENDATIONS MADE, AND WHEN IN LIGHT OF THE OVERWHELMING EVIDENCE AGAINST

THE PETITIONER, ANY FAILURE TO DISCLOSE CONVERSATIONS BETWEEN THE WITNESS AND THE POLICE DETECTIVE PRIOR TO TRIAL WOULD NOT HAVE AFFECTED THE JURY'S VERDICT.

IV. WHETHER PETITIONER MAY NOW CLAIM HIS RIGHTS WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO GRANT EXPENSES FOR A BALLISTICS EXPERT TO PROVIDE EXPERT TESTIMONY WITH RESPECT TO THE IDENTITY OF THE MURDER WEAPON, WHEN NO SUCH REQUEST FOR A BALLISTICS EXPERT WAS MADE AT TRIAL.

V. WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO GRANT PETITIONER'S MOTION FOR FUNDS TO EMPLOY AN INVESTIGATOR, WHEN DEFENSE COUNSEL ATTENDED THE PRELIMINARY HEARING AND WAS ABLE TO CROSS-EXAMINE AT LEAST THREE OF THE VICTIMS OF THE ARMED ROBBERY IN WHICH PETITIONER PARTICIPATED, AND TWO OF THE STATE'S INVESTIGATING OFFICERS WHO WERE CALLED AS WITNESSES AT TRIAL, AND WHEN DEFENSE COUNSEL CONSULTED WITH PETITIONER ON AT LEAST A DOZEN OCCASIONS PRIOR TO TRIAL, HAD NUMEROUS CONVERSATIONS WITH THE ASSISTANT DISTRICT ATTORNEY WHO WAS PROSECUTING THE CASE AND HAD AN OPPORTUNITY TO THOROUGHLY REVIEW THE DISTRICT ATTORNEY'S FILE, WHICH INCLUDED RESTATEMENTS FROM THE WITNESSES AND ALL LABORATORY REPORTS; AND WHEN PETITIONER'S TRIAL COUNSEL TESTIFIED AT THE STATE HABEAS CORPUS HEARING THAT HE FELT HE HAD ENOUGH TIME TO PREPARE FOR THE CASE.

VI. WHETHER OR NOT PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE TRIAL COURT'S INSTRUCTIONS TO THE JURY ON THE QUESTION OF INTENT; AND ASSUMING ARGUENDO AN ERRONEOUS INSTRUCTION IS FOUND, WHETHER OR NOT SAID ERROR WAS HARMLESS IN LIGHT OF THE OVERWHELMING EVIDENCE AT PETITIONER'S TRIAL.

VII. WHETHER OR NOT PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED AS A RESULT OF THE PROSECUTOR'S ARGUMENTS DURING THE PENALTY PHASE OF PETITIONER'S TRIAL.

VIII. WHETHER PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN ACCORDANCE WITH HIS SIXTH AMENDMENT RIGHT UNDER THE UNITED STATES CONSTITUTION.

IX. WHETHER OR NOT ANY OF THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED THROUGH THE TRIAL COURT'S EXCLUSION OF TWO PROSPECTIVE JURORS WHO VOICED UNYIELDING OPPOSITION TO CAPITAL PUNISHMENT.

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PART ONE

STATEMENT OF THE CASE

On June 13, 1978, the Fulton County Grand Jury returned a three count indictment against the Petitioner, and his co-defendants David Burney, Bernard Dupree, and Ben Wright, Jr., charging said individuals with the offense of murder and two counts of armed robbery. (R. 1-3).[1/] The Petitioner, Warren McCleskey, was tried separately on October 9-12, 1978, and was found guilty on all three counts. (T. 110, R. 55). The jury imposed the death penalty on the murder count, finding that: (1) the offense of murder was committed while the Petitioner was engaged in the commission of another capital felony, and (2) the offense of murder was committed against a peace officer, corrections employee or fireman while engaged in the performance of his official duties. (T. 1031, R. 56). Consecutive life sentences were imposed on the two counts of armed robbery. (R. 56).

Petitioner's convictions were affirmed by the Georgia Supreme Court on direct appeal, and his petition for certiorari was denied. McCleskey v. State, 245 Ga. 108 (1980), cert. den., ___U.S.___, 100 S.Ct. 253 (1980).

Following the denial of certiorari, Petitioner filed a state habeas corpus petition in the Superior Court of Butts County, Georgia. Following an evidentiary hearing, the Butts County Superior Court denied Petitioner's request for relief in an order dated April 8, 1981. The Georgia Supreme Court denied his application for a certificate of probable cause to appeal on June 17, 1981, and thereafter, Petitioner filed his second petition for certiorari in this Court.

1/ References in this Brief to the pagination of the Record in Fulton County shall be designated as (R. ___). References to the pagination of the official trial transcript shall be designated as (T. ____).

PART TWO

STATEMENT OF THE FACTS

The evidence which was presented at Petitioner's trial showed that on May 13, 1978 he and his three co-defendants executed the robbery of the Dixie Furniture Store in Atlanta, Georgia. During the course of this robbery, the Petitioner entered the front of the store while his three co-defendants entered the back. Petitioner was positively identified at trial, as one of the participants in the robbery. (T. 231, 242, 250).

Following the Petitioner's arrest he was taken to Atlanta and on May 31, 1978 he made a confession to the police admitting his participation in the robbery, but denying that he shot Atlanta Police Officer Frank Schlatt. The trial court held a Jackson v. Denno hearing and determined that Petitioner's signed confession was freely, intelligently and voluntarily entered. (T. 426-505). The Georgia Supreme Court affirmed this ruling on appeal. McCleskey v. State, supra, at p. 112).

Petitioner's co-defendant, Ben Wright, also testified at the trial and related the details of the robbery and murder. He testified that while he carried a sawed-off shotgun, the Petitioner carried a .38 caliber nickle-plated, white-handled pistol. (T. 654-656, 648-649). Co-defendant Burney had a blue steel, snub-nosed .38 caliber pistol while Dupree had a blue steel .25 caliber pistol. (T. 649).

While Dupree, Burney and Wright held several employees in the back of the store, Petitioner was in the front. (T. 656). Unbeknownst to Petitioner and his cohorts, employee Classie Barnwell had activated a silent alarm, which resulted in the arrival of Officer Frank Schlatt. (T. 213-214). Shortly after Schlatt entered the front of the store he was ambushed

and gunned down. Ater hearing two shots Wright observed Petitioner running out the front of the store. (T. 657-707). Wright, Dupree and Burney ran out the back, and when they all arrived at the car, Petitioner stated that he had shot the police officer. (T. 658-659).

Mr. Everett New and his wife were stopped in their automobile at a red light near the Dixie Furniture Store. They observed Officer Schlatt arrive at the scene, saw him draw his pistol and enter the store. (T. 330). Mr. New stated that approximately thirty seconds later he heard two shots and shortly thereafter observed a black man running out of the front door carrying a white-handled pistol. Unfortunately, he could not identify that individual. (T. 331-333).

The state also introduced the testimony of Mr. Offie Evans who had been incarcerated in the Fulton County Jail in a cell which was located near the Petitioner and his co-defendant Bernard Dupree. (T. 860-861, 869). Evans related that the Petitioner had talked about the robbery and had admitted shooting at Officer Schlatt. (T. 869-870).

Petitioner testified in his own behalf at trial, and stated that he knew Ben Wright and the other co-defendants, but that he had not participated in the robbery. (T. 806-808, 826). He relied on an alibi defense, stating that Wright had borrowed his car, and that he had spent the day at his mother's house and at the Ponderosa Apartments in Marietta, playing cards. (T. 809-811). Petitioner named several people who had been present at the apartments; however, he was unable to produce any for his defense.

Petitioner denied that he had made a statement to Lieutenant Perry that he had participated in the robbery, (T. 822-823),

and stated that he had made a false statement to Atlanta Detective Jowers, because of the alleged evidence the police had against him (two witnesses who would identify him, the description of his car, and a statement from David Burney), because of his prior convictions, and because he did not have a good alibi. (T. 823-824). He also stated that he expected some immunity for his testimony. (T. 820).

Petitioner was also identified at trial by two witnesses who had observed him take part in a prior, similar robbery. Mr. Paul David Ross, Manager of the Red Dot Grocery Store had identified the Petitioner previously from a set of color photographs. (T. 735, 737). Ross also testified that during the course of the Red Dot robbery his nickle-plated .38 caliber revolver was taken. (T. 725).

Ross' testimony was buttressed by that of Ms. Dorothy Umberger who also viewed the Petitioner during the April 1, 1978 robbery of the Red Dot Grocery Store. Ms. Umberger testified that she was ninety percent sure that the Petitioner was one of the men who had robbed her, and she based her identification upon him from her viewing him at the scene. (T. 746-747, 753-754). At the time the Petitioner was holding a gun to her head. (T. 747). In addition to observing him at trial, Ms. Umberger had identified the Petitioner from a photographic display. (T. 745).

Arthur Kiessling testified on rebuttal and for impeachment purposes that he had observed the Petitioner participating in the robbery of Dot's Produce on March 28, 1978. His identification of the Petitioner was positive. (T. 887-889, 896).

Additional facts will be recited when necessary to augment the following Argument and Citation of Authority.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. NEITHER EVIDENCE OF PETITIONER'S PRIOR CRIMINAL ACTS WHICH WERE ADMITTED DURING HIS TRIAL, NOR THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL, VIOLATED ANY OF PETITIONER'S CONSTITUTIONAL RIGHTS.

Under Petitioner's first argument he contends that certiorari should be granted to review whether the introduction into evidence of the Petitioner's participation in other armed robberies, and the trial court's instructions or absence of instructions on same, operated to deprive Petitioner of a fair trial in violation of his Eighth and Fourteenth Amendment rights. Initially, this Court should note that these same issues were raised on Petitioner's first petition for certiorari which was brought to this Court following the affirmance of Petitioner's convictions and sentences by the Georgia Supreme Court on direct appeal. See, McCleskey v. Georgia, Case No. 79-6830. In denying certiorari, McCleskey v. Georgia, ___U.S.___, 101 S.Ct. 253 (1980), this Court implicitly found that there was no error in the introduction into evidence of Petitioner's prior criminal activity, nor was there error in the trial court's instructions to the jury during the sentencing phase of Petitioner's trial. In petitioning for certiorari from the denial of relief in Petitioner's state habeas corpus action in the Superior Court of Butts County, and from the denial of a certificate of probable cause to appeal by the Georgia Supreme Court, Petitioner has not shown any additional reasons as to why certiorari should now

be granted at this time, in view of this Court's previous refusal to grant certiorari following direct appeal.

The Georgia Supreme Court has reviewed the introduction into evidence of the objected to testimony pertaining to Petitioner's participation in other robberies, and which Petitioner claims has prejudiced him. McCleskey v. State, supra at p. 114. Evidence of Petitioner's prior criminal acts was properly admitted into evidence during the State's case in chief at Petitioner's trial, not to show that the Petitioner was predisposed toward the commission of criminal acts, but rather to establish identity, common plan or scheme, state of mind, motive and intent. (T. 665-666, 723-727, 738-752). After Petitioner had taken the witness stand, and had put his character into issue, certified copies of Petitioner's prior convictions for armed robberies in Cobb, Fulton and Douglas Counties (T. 843-844, 854-855) were clearly admissible for impeachment purposes. Timberlake v. State, 246 Ga. 488(6), 271 S.E.2d 792 (1980). No limiting instructions for these convictions were requested. Evidence concerning Petitioner's participation in the robbery of Dot's Produce was submitted by the state on rebuttal (T. 885-897), and only after the Petitioner had previously taken the witness stand and specifically denied his participation in the robbery. (T. 837). Once again, there were sufficient similarities in the Dot's Produce robbery and the instant case to show identity, course of conduct, intent and bent of mind. Petitioner was identified as a participant in both the Dot's Produce robbery, and the robbery of the Red Dot Grocery Store.

Moreover, the trial court gave limiting instructions to the jury relating to both the Red Dot and Dot's Produce robberies. (T. 673-674; 885). Additionally, prior to the

jury's deliberations during the guilt/innocence phase of the trial, the court specifically instructed the jury relating to its use of the prior criminal acts. (T. 992-993).

In Spencer v. Texas, 385 U.S. 554, 560-561 (1977), this Court summarized its view relating to the regulation of state evidentiary rules pertaining to evidence of prior offenses. This Court noted that:

> "Because such evidence is generally recognized to have potentiality for prejudice, it is usually excluded except when it is particularly probative in showing such things as intent, . . . an element in the crime . . . identity, . . . malice, . . . motive, . . . a system of criminal activity, . . . or when the defendant has raised the issue of his character, . . . or when the defendant has testified and the state seeks to impeach his credibility." (Cases omitted).

Thus, in order to protect a criminal defendant from unfair prejudice, evidence of other criminal acts is generally inadmissible to show that a defendant is likely to have acted in accordance with his criminal character, but "[t]here are some numerous other purposes for which evidence of other criminal acts may be offered, and when so offered the rule of exclusion is simply inapplicable." McCormick, Evidence, 2nd Ed., p. 447-448 (1972).

This Court recognized in Spencer, that states must be given discretion in determining the other purposes for which they will allow evidence of prior criminal acts. This deference to state decision making reflects this Court's practical realization that, "[t]o say that the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into [the] entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence." Spencer v. Texas, 385 U.S. 562 (1977). A state may regulate the procedure of its courts in accordance with the its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be rated as fundamental. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). It is clear that the admission into evidence of prior criminal acts to prove relevant factors other than a defendant's criminal propensity violates no such fundamental principles, and therefore is not in violation of the Constitution. See, Lisenba v. California, 314 U.S. 219, 227-228 (1941); Manning v. Rose, 507 F.2d 889, 892-895 (6th Cir. 1974).

Accordingly, evidence of Petitioner's participation in the prior robberies at the Red Dot Grocery and Dot's Produce, were properly admitted to establish identity, common plan or scheme, state of mind, motive and intent. Such evidence falls within a recognized Georgia exception to the general rule against the admissibility of other criminal activity, and since Petitioner was positively identified as the perpetrator of the Red Dot robbery (T. 666, 727, 747, 753), and since there were sufficient similarity or connection between the Red Dot robbery and the present case, so that proof

of the former tended to prove the latter, such evidence was properly admitted. McCleskey v. State, supra, 245 Ga. at p. 114; see, French v. State, 237 Ga. 620, 229 S.E.2d 410 (1976). It should also be noted that the jury was carefully instructed to consider the evidence only for the limited purposes for which it had been admitted. (T. 673-674, 992-993).

In addition to being a similar crime, evidence relating to the robbery of Dot's Produce was also properly admitted since, "A witness may be impeached by disproving the facts testified to by him." Ga. Code Ann. § 38-1802. Once Petitioner took the witness stand and testified that he was not involved in the Dot's Produce robbery, and that, he in fact did not know anything about it, evidence showing his involvement in said robbery was properly admitted for the purposes of impeaching his credibility. In addition, the jury was instructed by the trial court to consider the evidence for impeachment purposes only. (T. 885, 990-992).

As was noted previously, it is well settled under Georgia law that a witness' conviction for a crime involving moral turpitude may be considered in determining his credibility. Shaw v. State, 102 Ga. 660, 29 S.E. 477 (1897); Powell v. State, 122 Ga. 571, 50 S.E. 361 (1905); Timberlake v. State, supra. On his direct testimony, Petitioner even admitted that he had been convicted of numerous robbery counts in 1970. (T. 805-806).

Since, in the instant case all of the evidence of Petitioner's prior criminal acts was admitted in conformance with Georgia evidentiary law, and since Petitioner's rights were sufficiently protected by limiting instructions to the jury, which insured that the evidence of the other crimes was considered only for legitimate purposes, the state's evidentiary rulings have

not violated Petitioner's constitutional rights.

Moreover, the sentencing instructions given by the trial court did not give the jury unlimited discretion in considering Petitioner's prior criminal activities, when deciding whether or not to impose the death penalty in this case. Since the trial court's instructions were not so defective so as to render Petitioner's trial fundamentally unfair, the state habeas court was justified in refusing Petitioner's request for relief. Bryan v. Wainwright, 588 F.2d 1108, 1111 (5th Cir. 1979); Parrish v. Hopper, 238 Ga. 468, 233 S.E.2d 161 (1977). Of course, it was necessary to consider the instructions as a whole and in the context of the overall trial. United States v. Park, 421 U.S. 658, 674 (1975); Cupp v. Naughten, 414 U.S. 141, 147 (1973); Felts v. Georgia, 244 Ga. 503, 505, 260 S.E.2d 887 (1979).

In Gregg v. Georgia, 428 U.S. 153, 189 (1976), quoting Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937), this Court recognized that, "[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Accordingly, Ga. Code Ann. § 27-2503 provides for a presentence hearing in Georgia's bifurcated death penalty procedures which presents a defendant's history to the jury so that it may make the proper decision as to punishment. Gates v. State, 244 Ga. 587, 595, 261 S.E.2d 349 (1979). Evidence presented by both sides during the guilt/innocence phase of the trial may be considered, as well as such additional evidence in aggravation as the State has made known to the accused prior to trial. In the present case, Petitioner was given notice of the prior convictions which the State tendered in aggravation of Petitioner's punishment. (R. 47). It is clear that such evidence constitutionally may be

offered as a basis for imposition of an enhanced sentence. Spencer v. Texas, 385 U.S. 554, 560 (1967).

Ga. Code Ann. § 27-2503 further provides that, "[u]pon the conclusion of evidence and arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances as defined in Section 27-2534.1 exists and whether to recommend mercy for the defendant." In order to guide the jury's deliberations Ga. Code Ann. § 27-2534.1(b) enumerates ten statutory aggravating circumstances which might justify imposition of the death penalty. The jury is permitted to consider any other appropriate aggravating and mitigating factors, but is not required to find any specific mitigating circumstances in order to make a recommendation of mercy and life imprisonment. It is incumbent upon the jury to find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt before it may impose the death penalty. Ga. Code Ann. § 27-2534.1(b).

During the sentencing phase of Petitioner's trial, the jury was instructed to consider all of the evidence received in court, presented by the State and the defendant throughout the trial. (T. 1028). As noted previously, this instruction should not be considered in isolation, but should be considered along with the others given by the trial court. The jury was permitted to consider all of the evidence relating to Petitioner's background, past record, character and the circumstances of the case. This is in accordance with the concept of individualized sentencing as set out in Lockett v. Ohio, 438 U.S. 586 (1978). Here, under Ga. Code Ann. § 27-2534.1(b) and § 27-2503, the evidence of Petitioner's prior convictions for armed robbery, which he admitted on his direct testimony, and on cross-examination were proper for the jury's consideration in determining his sentence.

Furthermore, evidence of the additional two robberies at the Red Dot Grocery Store and at Dot's Produce, in which Petitioner had participated, but for which he had not been convicted, certainly could not have harmed him to any greater degree than the prior six robberies for which he had been convicted. (T. 805-806, 843-847). Moreover, as noted previously, the trial court had instructed the jury to consider evidence of the Red Dot robbery only for purposes of showing motive, identity, common plan or scheme; and had instructed that the evidence of the Dot's Produce Robbery was to be utilized only for impeachment purposes. (T. 673-674; 885).

Contrary to what appears to be Petitioner's assertions, it was not improper under Georgia law for the jury to consider Petitioner's prior convictions and criminal behavior in determining his sentence, so long as the jury was properly instructed that before the death penalty could be imposed, it was necessary for them to find at least one or more of the statutory aggravating circumstances beyond a reasonable doubt. In the present case, the jury was carefully instructed on the proper consideration of aggravating and mitigating circumstances in accordance with Georgia law. (T. 1027-1029). For example, the jury was instructed that before it would be authorized to impose the death penalty in this case it would have to find beyond a reasonable doubt that either the murder was committed while the Petitioner was engaged in the commission of an armed robbery or that the murder was committed against a peace officer while he was engaged in the performance of his official duties. [Ga. Code Ann. § 27-2534.1(b)(2) and (b)(8)]. The jury was instructed on the definition of mitigating circumstances and was told that it was not mandatory that a death penalty be imposed even if one of the aggravating circumstances existed. (T. 1028-1029). The jury had previously been instructed

that it could consider evidence of Petitioner's participation in crimes for which he had not been convicted, evidence of which was introduced during the guilt and innocence phase of Petitioner's trial, only for the purposes of showing intent, common plan or scheme, or motive, or for impeachment purposes. (T. 673-674, 992-993; 885, 990-992). In light of the instructions which were given, it cannot be said that Petitioner was deprived of a fundamentally fair trial.

For all of the aforesaid reasons, this Court should refuse to grant certiorari to review Petitioner's first issue.

II. THE STATE HABEAS CORPUS COURT AND THE GEORGIA SUPREME COURT HAVE PROPERLY FOUND THAT PETITIONER'S DEATH PENALTY HAS NOT ARBITRARILY OR CAPRICIOUSLY BEEN IMPOSED.

Under Petitioner's second argument, he asserts that certiorari should be granted to determine whether the death penalty in Georgia is being applied arbitrarily and capriciously. In regards to this particular case, Petitioner cites to this Court his first exhibit at the state habeas hearing which allegedly shows a discriminatory pattern of prosecution against those black males who have killed white police officers.

An examination of the basis for Petitioner's claims, shows that his showing in the state habeas court had been totally insufficient. For example, Petitioner's Exhibit 1, attached as Appendix A to this Brief in Opposition, was a compilation prepared by a detective for the Atlanta Bureau of Police Services, and consisted of a summary of the Police

Bureau records pertaining to cases from 1960 to the time of the habeas hearing, reflecting situations where police officers in Atlanta had been killed on duty. A review of this summary shows only sixteen such cases. In five of these cases the perpetrator was either unknown, or the petitioner failed to show disposition of the case. In three of the cases the perpetrator was killed, and in one of the cases the perpetrator was found not guilty. Of the remaining seven cases, five involved situations where a total of six black males had killed five white male police officers. Of these, three of the defendants allegedly received the death penalty and three received life sentences. In the remaining two cases involving the deaths of black male police officers, each involved situations where two black male perpetrators had been defendants. In regard to these four invididuals, a review of the entire record shows that the disposition on one of the defendants, Kenneth Smith, is actually unknown, the disposition of James Carter appears to be that he was convicted of voluntary manslaughter and received a ten year sentence, the disposition of Nathanial Ways' case appears to be that he pled guilty and received a life sentence, and finally it appears that the murder charge against Frank Lee was dismissed. (Petitioner's Habeas Corpus Exhibit 3, HC. 217-219).

Thus, Respondent submits that the evidence cited by Petitioner is simply insufficient to support his conclusion of a pattern or practice of arbitrary, capricious infliction of the death penalty against black males who have killed white police officers in Atlanta. Moreover, Petitioner's evidence fails to make any showing as to the evidence which was actually produced at any of the trials of the aforesaid defendants, fails to show the backgrounds of those individuals

accused of murdering the police officers, and fails to take into consideration any of the aggravating or mitigating factors which the jury may have considered.

Petitioner also asserts under his second argument that the review process of the Georgia Supreme Court is insufficient to insure the nonarbitrary penalty. He bases his arguments on the cases cited by the Georgia Supreme Court in their appendix to Petitioner's case. However, a review of this case shows that Petitioner's crimes fell well within the perimeters authorizing the infliction of the death penalty under Georgia law. Here, the state showed that Petitioner was a prime mover in the robberies and murder. His automobile was utilized in the incident (T. 514, 531-532, 647-648), and Petitioner admitted in his two confessions to the police that he had participated in the armed robbery. (T. 511-530, 759-760). During the robbery and shooting the Petitioner was carrying a silver-plated, white-handled, .38 caliber pistol which was similar to that taken in a prior robbery in which he had participated, and which was similar to the pistol which had shot the victim, Office Schlatt. (T. 649,655, 680, 725-727, 257, 412-415). Petitioner admitted to his accomplices that he had shot the police officer. (T. 658-659, 661). He also admitted to a police informant that he had been the triggerman. (T. 870).

Here, as previously noted, the death penalty was authorized by the jury's finding of two separate aggravating circumstances. The Georgia Supreme Court reviewed the case and applied this Court's standard of Jackson v. Virginia, 443 U.S. 307 (1979), and found the evidence sufficient to support the aggravating circumstances beyond a reasonable doubt. McCleskey v. State, supra at p. 115-116.

Petitioner's reliance upon Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759 (1980) is misplaced. Godfrey was concerned with whether the Georgia Supreme Court had given a too broad construction to Ga. Code Ann. § 27-2534.1(b)(7) under the facts of that case. Id., at p. 1762. There, the jury had imposed the death penalty upon a finding that the murder was "outrageously or wantonly vile, horrible or inhuman." Since the Court found no evidence of torture, aggravated battery or a depraved mind, also necessary requirements under (b)(7), Godfrey's death penalty was reversed.

Contrary to Godfrey, here there was more than sufficient evidence to support the aggravating circumstances found by the jury. The evidence showed an ambush-type murder upon a police officer while he was investigating an armed robbery. The evidence showed Petitioner to be the triggerman. Under such circumstances, it cannot be found that the death penalty has been arbitrarily or capriciously imposed.

Thus, this Court should refuse to grant certiorari to review Petitioner's second argument.

III. THE STATE DID NOT WITHHOLD FROM THE PETITIONER ANY MATERIAL, EXCULPATROY EVIDENCE RELATING TO THE TESTIMONY OF ANY WITNESSES.

Under Petitioner's third argument, he contends that the state allegedly suppressed favorable, material evidence concerning an alleged promise made to witness Offie Evans by Atlanta Police Detective Sidney Dorsey. Contrary to Petitioner's assertions, the state habeas court did not make a finding that the Atlanta Police Detective had made a promise to Mr. Evans in exchange for his testimony at trial. In fact, the state habeas court specifically noted that at the habeas hearing, Mr. Evans denied that there were any promises made for his testimony. (HT. 122). 2/ However, the court did note that witness Evans testified that Dorsey had told him he would "speak a word for me." (HT. 122). Mr. Evans specifically stated that the state prosecutor, Russell Parker had made no promises or any kind of deal in exchange for his testimony. (HT. 129). Moreover, in the deposition of Assistant District Attorney, Russell Parker, which was considered by the state habeas court, Mr. Russell stated that he was not aware of any understandings between any Atlanta Police Department detective and witness Evans. (Parker Deposition, p. 10). Mr. Parker further stated that he was not aware of any deals made with Evans, and that he had never asked anybody to drop any charges for Evans. Based on the evidence which was presented, the state habeas court simply did not conclude that any agreement had existed pertaining to Mr. Evans' testimony. (See, Petitioner's Appendix A, A-7, A-8).

2/ References to the transcript of Petitioner's state habeas corpus hearing shall be referred to as (HC._____).

Since there was no material, impeaching evidence withheld, Giglio v. United States, 405 U.S. 150 (1972), and Brady v. Maryland, 373 U.S. 83 (1963) were not violated. Moreover, in light of the overall evidence presented in this case, there is no reasonable likelihood that any nondisclosure pertaining to statements made between Dorsey and Evans, would have affected the judgment of the jury. Giglio, 405 at p. 154.

Finally, the decisions cited by Petitioner [Freeman v. State of Georgia, 599 F.2d 65 (5th Cir. 1979); Williams v. Brown, 609 F.2d 216 (5th Cir. 1980); Smith v. Florida, 410 F.2d 1349 (5th Cir. 1969); Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1977); and United States v. Sutton, 542 F.2d 1239 (4th Cir. 1979)] all involve cases where police officers or prosecutors intentionally and deliberately withheld material testimony or evidence, or in the case of United States v. Sutton, supra, engaged in action which was equivocated to an intentional withholding of information. In the instant case, there is absolutely no showing of any intentional or deliberate concealment.

For all of the aforesaid reasons, this Court should refuse to grant certiorari to review Petitioner's third argument.

. THE DENIAL OF PETITIONER'S PRETRIAL MOTION FOR EXPERT WITNESSES DID NOT DEPRIVE HIM OF A FUNDAMENTALLY FAIR TRIAL OR DUE PROCESS.

Approximately one month before the commencement of Petitioner's trial, his defense attorney submitted a motion for funds to employ expert witnesses, wherein he requested that he be permitted to employ a criminal investigator and a trained psychologist or psychiatrist at the state's expense. The trial court did not grant the motion.

It is clear that the defense had access to the prosecutor's file which included statements from all of the witnesses (except witness Offie Evans), and all of the reports from the Georgia State Crime Laboratory. There was no request in the motion for a ballistics expert, and even if an independent ballistics expert could have testified that another weapon, other than a Rossi, possibly may have fired the fatal bullets, this still would not have been sufficient in light to the totality of the evidence to create a reasonable doubt as to the Petitioner's participation in the robbery and his firing the murder weapon. See, Hoback v. Alabama, 607 F.2d 680(1) (5th Cir. 1979).

The ballistics expert who testified at Petitioner's state habeas corpus hearing by way of deposition, testified that he had no objection to talking to a defense attorney, but could not have told him anything different from what was already in his ballistics report, and that was that the bullets were probably fired from a .38 caliber Rossi. This was the same testimony as was elicited at trial.

Although the ballistics expert testified that some Taurus and Charter Arms pistols had similar ballistic characteristics to the .38 caliber Rossi; there was no evidence adduced at trial that any of Petitioner's co-defendants carried these other type weapons.

Here, in light of the overwhelming evidence against Petitioner, it cannot be said that the trial court abused its discretion or that he was denied a fundamentally fair trial due to the court's refusal to grant him investigative funds. The case of Little v. Streater, ___U.S.___, 101 S.Ct. 2202 (1981), cited by Petitioner is clearly distinguishable from this case, and does not lend support to Petitioner's arguments. In that case, this Court held unconstitutional a Connecticut statute which required costs of blood-grouping tests to be chargeable against a party making a motion for such tests. In that case, the Petitioner was an indigent defendant in a paternity suit, and the blood-grouping tests were of paramount importance in the case, because following the presentation of a prima facie case by the mother, the burden was upon the defendant father of showing his innocence by other than his own testimony. Thus, in Little v. Streater, the state statute operated to deprive the indigent defendant father of a fair opportunity to even present evidence in support of his case, and thus it violated due process. On the other hand, in Petitioner's case there was no obstacle to defense counsel's questioning the state ballistics expert pertaining to his findings. Defense counsel also had ample opportunity to review the report of the state ballistics expert.

Again, even if an independent ballistics expert may have testified that another weapon other than a .38 caliber Rossi possibly could have been the murder weapon; nevertheless,

there was overwhelming evidence that the Petitioner was the triggerman, and he utilized a .38 caliber nickle-plated, white-handled Rossi in the shooting.

Witness Paul D. Ross testified that in another robbery which had occurred on April 1, 1978 at the Red Dot Grocery Store, Petitioner had stolen some money, and had stolen his nickle-plated, .38 caliber pistol. (T. 724-727, 730). Witness Mary Jenkins testified that she had seen the Petitioner carrying a .38 caliber silver pistol. (T. 607). Petitioner's co-defendant, Ben Wright testified that on the day of the robbery, Petitioner had been armed with a .38 caliber nickle-plated, white-handled pistol. (T. 648-649). Petitioner's co-defendant also testified that during the robbery, Petitioner was the only one at the front of the store. (T. 656). Mr. Everett New testified that immediately following the shooting he observed a black male running from the front of the store carrying a white-handled pistol. (T. 331-333). Upon arriving at the getaway car, Petitioner admitted that he had shot Officer Schlatt. (T. 658-659). Later, while incarcerated at the Fulton County Jail, Petitioner again admitted that he had shot Officer Schlatt. (T. 869-870).

The only statements that defense counsel did not review in the District Attorney's file pertained to those made by Offie Evans, who testified as to Petitioner's statements at the Fulton County Jail. Even if a privately employed investigator may have discovered Evans' potential testimony prior to trial; nevertheless, this still would not have effected Petitioner's case, or cast any doubt upon his being the triggerman.

For all of the aforesaid reasons, this Court should decline Petitioner's request for a writ of certiorari to review Petitioner's fourth argument.

V. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DID NOT OPERATE TO VIOLATE ANY OF PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner's fifth argument asserts that the trial court's charge to the jury during the guilt/innocence phase of his trial operated to shift the burden of proof to the Petitioner on the question of malice and intent, thus relieving the state from having to prove said issues beyond a reasonable doubt. During the guilt/innocence phase of Petitioner's trial, the trial court charged as follows:

> "Now, in every criminal prosecution, Ladies and Gentlemen, criminal intent is a necessary and material ingredient thereof. To put it differently, a criminal intent is a material and necessary ingredient in any criminal prosecution.
>
> I will now try to explain what the law means by criminal intent by reading to you sections of the Criminal Code dealing with intent, and I will tell you how the last section applies to you, the jury.
>
> One section of our law states that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, and a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both these presumptions may be rebutted.
>
> I charge you, however, that a person will not be presumed to act with criminal intent, but the second code section says that the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted." (T. 996-997).

In addition to the above, the trial court also instructed on the presumption of innocence in the defendant's favor, and the burden is upon the state to prove all allegations of each count beyond a reasonable doubt. (T. 988). The trial court also gave a detailed charge on malice as an element of malice murder. (T. 998-999, 1008).

Before relief may be granted in a collateral attack, based upon an erroneous jury instruction, the trial court must find that the instruction so infected the Petitioner's entire trial, that the resulting conviction violated due process. Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Cupp v. Naughten, 414 U.S. 141, 147 (1973). It is axiomatic that the trial court's charge must be considered as a whole, Cupp v. Naughten, supra, 414 U.S. at p. 147, and careful attention must be afforded to the words actually spoken to the jury, County Court of Ulster County v. Allen, ___U.S.___, 99 S.Ct. 2213, 2225 (1975). Whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction. Sandstrom v. Montana, 442 U.S. 510 (1979).

It is clear that in a criminal case, it is incumbent upon the state to prove every element of the alleged offense beyond a reasonable doubt, and the state may not shift the burden of proof to the defendant on an essential element of the crime by presuming that ingredient upon the showing of other elements of the offense. Patterson v. New York, 432 U.S. 197, 215 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). Nevertheless, permissive inferences or presumptions which allow, but which do not require the trier of fact to infer an elemental fact from proof by the state of a basic fact, place no burden on the accused, and are not unconstitutional unless, under the facts of the case there is no rational way a trier of fact

could have made the connection as permitted by the inference. Ulster County, supra, 99 S.Ct. at p. 2224. Ultimately, the test of a presumptions constitutional validity in any given case depends upon whether the evidentiary device undermines the fact finder's responsibility at trial, based upon the evidence produced by the state, to find the ultimate facts beyond a reasonable doubt. Id., citing In Re Winship, 397 U.S. 358, 364 (1970), and Mullaney v. Wilbur, supra, 421 U.S. at p. 702-703, n. 31.

As noted by Petitioner, recently the Fifth Circuit Court of Appeals in Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981), held that an instruction similar to that challenged in this case was unconstitutional; however, in reaching this conclusion, the Court considered other factors in addition to the precise words which had been spoken. The court noted that the primary issue was whether the Petitioner possessed a specific intent to kill or do great bodily harm to more than one person, and the court further noted that since the facts revealed that Tyler had fired a fully loaded pistol only once, the state relied heavily on the statutory presumption. Id., at p. 1099. The presumption was stressed by the prosecutor both in his opening and closing arguments, and the judge additionally stressed the presumption in his instructons to the jury. Such was not the case at Petitioner's trial. Recently in United States v. Caucci, 635 F.2d 441, 446-447 (5th Cir. 1981) the court stated that even a burden-shifting charge does not necessarily, automatically require reversal when there is evidence before the jury of objective conduct demonstrating criminal intent. Id., citing, United States v. Chiantese, 582 F.2d 947, 977 (5th Cir. 1978) and United States v. Spiegel, 604 F.2d 961, 970 (5th Cir. 1979). Here, there was overwhelming evidence of objective conduct demonstrating malice and criminal intent. Thus, even if this Court should

conclude the charge was erroneous, said error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

Finally, the instant challenge to the jury instructions was not made on direct appeal to the Georgia Supreme Court, and was not raised at trial. At the state habeas proceeding, Petitioner's trial counsel was called as a witness, but there was no testimony establishing an absence of cause for the procedural default, and there was no showing of prejudice. Under such circumstances, the question of an improper jury challenge should not have been reviewed in habeas corpus. See, Wainwright v. Sykes, 433 U.S. 72 (1977); Tyler v. Phelps, supra at p. 1100-1102 (5th Cir. 1981).

For all of the aforesaid reasons, this Court should refuse to grant certiorari to review Petitioner's fifth argument.

VI. THE PROSECUTOR'S CLOSING ARGUMENTS TO THE JURY DID NOT DENY PETITIONER A FUNDAMENTALLY FAIR TRIAL.

Petitioner's sixth argument in his brief asserts that the prosecutor's closing arguments during the sentencing phase of Petitioner's trial made an impermissible reference to the appellate processes in Georgia, and the possibility that if sentenced to life, Petitioner could at some point, be released from imprisonment.

In order to justify relief in a post-conviction, collateral attack in habeas corpus, the petitioner must show that the prosecutor's comments in this case had been so prejudicial that they rendered his trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 636, 643 (1974); Jones v. Estelle,

622 F.2d 124, 127 (5th Cir. 1980). The statements must be considered not in isolation, but in the context of the entire trial. Branch v. Estelle, 631 F.2d 1229, 1233 (5th Cir. 1980); Houston v. Estelle, 622 F.2d 124, 127 (5th Cir. 1978).

Here, the district attorney was simply arguing that the protection of the community justified the need for the death penalty in this case, Petitioner had an extensive, past history of violent crime, had an opportunity to change his life and to set commendable goals. However, he maintained his old ways, thus causing the death of an innocent Atlanta police officer.

The Assistant District Attorney's arguments that the Petitioner had an opportunity to change, but did not do so, did not deprive Petitioner of any of his constitutional rights.

VII. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Under Ground Six, Petitioner asserts that he was denied effective assistance of counsel prior to trial, during the the guilt/innocence phase of his trial and during the sentencing phase. The standard for effective assistance under the Sixth Amendment to the United States Constitution is now well established. A criminal defendant is entitled to representation by an attorney reasonably likely to render and rendering reasonably effective assistance. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981); Jones v. Estelle, 622 F.2d 124 (5th Cir. 1980); Hill v. Wainwright, 617 F.2d 375 (5th Cir. 1980).

Of course, the standard does not require errorless counsel, nor counsel judged ineffective by hindsight. United States v. Johnson, 615 F.2d 1125 (5th Cir. 1980); Clark v. Blackburn,

619 F.2d 431 (5th Cir. 1980). The totality of the circumstances surrounding the trial, and the entire record must be considered in examining the performance of counsel. See, e.g., Lovett v. State of Florida, 627 F.2d 706 (5th Cir. 1980); Lee v. Hopper, 499 F.2d 456 (5th Cir. 1974). "It is within this framework of totality of circumstances that we judge the 'fundamental fairness' of the trial and untimately a counsel's ineffectiveness." Nelson v. Estelle, supra, at p. 906.

Here, a review of the entire record and Attorney Turner's testimony at the habeas hearing, amply demonstrates that Petitioner received effective assistance of counsel in accordance with federal standards.

Petitioner asserts that Attorney John Turner's failure to interview certain witnesses prior to trial resulted in his inability to develop a defense to the state's theory that the Petitioner was the actual triggerman who killed Officer Schlatt. At the habeas evidentiary hearing, Attorney Turner testified that he had been retained by the Petitioner prior to the preliminary hearing in Fulton County. At that preliminary hearing Turner had an opportunity to cross-examine at least three of the employees of the Dixie Furniture Company and two of the state's investigating officers who were later called as witnesses at the trial. Turner also consulted with the Petitioner on at least a dozen occasions prior to the trial, and had numerous conversations with the Assistant District Attorney who was prosecuting the case. Additionally, Turner testified that he had an opportunity to thoroughly review the District Attorney's file, which included reading the statements of the various witnesses. Petitioner's contention that Mr. Turner's failure to personally interview four witnesses

whose testimony would have cast substantial doubt on the state's evidence that McCleskey was the triggerman, is purely speculative. For example, as noted previously, defense counsel's failure to interview the state's ballistic expert, Kelly Fite, would not necessarily have been any more productive than Turner's cross-examination of him at trial. Fite testified that State's Exhibit No. 23, a bullet removed from a counch near the body of the victim, Schlatt, (T. 410), and State's Exhibit No. 5, bullet fragments removed from Schlatt's body (T. 257), were probably fired from the same Rossi .38 caliber special revolver. (T. 413-415). On cross-examination Turner specifically inquired of Fite, why he had stated that the weapon was "probably" a Rossi. (T. 419). This was the same question which was asked of Fite at the deposition which was put into evidence at Petitioner's state habeas hearing. At trial, Fite answered, "Well, I haven't examined every weapon ever made, but I have my file and the F.B.I.'s file which we have on a computer, that is the only weapon that it kicked out." (T. 419). On direct examination, Fite stated that the Rossi was the only weapon that produced the type of characteristics found on the examinied bullet. (T. 413-414).

The fact that Mr. Fite, now two years after trial, has stated that it is within the realm of possibility that a weapon other than a Rossi was the murder weapon, does not materially cast doubt on the jury's verdict, especially since none of the weapons were ever recovered and when the totality of the evidence showed overwhelmingly that during the robbery and shooting the Petitioner was carrying a silver-plated, white-handled .38 pistol which was similar to the pistol taken in a prior armed robbery in which the Petitioner had participated, and which was similar to the pistol which shot Officer Schlatt. (T. 649, 665, 680, 725-727, 757, 412-415). The failure to

speak to Mr. Fite prior to trial, should also be considered in light of Petitioner's own inculpatory statements, wherein he admitted that he had shot the police officer. (T. 658, 659, 869-870).

Pertaining to the testimony of the state's rebuttal witness, Offie Evans,who testified regarding an alleged admission of guilt by the Petitioner, it is inconceivable that the defense would have benefited to any great degree even if defense counsel had known that witness Evans had overheard the Petitioner make an inculpatory statement while at the Fulton County Jail. The state had made no secret of Evans' past criminal record, and the outstanding escape charges pending against him at the time of his testimony. (T. 865-866). Turner did cross-examine Evans about his pending criminal escape charge, and Evans indicated that his cooperation was not related to that charge. (T.882). Turner also had no reason to believe that the Petitioner had made any statements while incarcerated, because McCleskey had told him that he had not spoken to anyone at the jail relating to the incident, and Turner additionally instructed him not to do so.

Petitioner's contentions that his attorney was ineffective during the actual trial are also unmeritorious. First, although Petitioner had an opportunity to elicit from defense counsel why he did not object to the trial court's instructions, or the District Attorney's arguments, he did not pursue such questioning at the state habeas hearing. In any case, since the trial court's instructions and the District Attorney's arguments were not erroneous or at the most were harmless error, any absence of objections would not have deprived Petitioner of a fair trial. Since there was no alleged deal or agreement

with witness Offie Evans, in exchange for his testimony, counsel was not remiss in failing to chase down that blind alley. Since it is clear that the eyewitness identification of the Petitioner was based upon witness identifications of him at the scenes of the various crimes, even if counsel could possibly have shown a suggestive identification display, reversible error was not present. United States v. Wade, 388 U.S. 218 (1967); Neil v. Biggers, 409 U.S. 118, 198-199 (1972). Petitioner has shown absolutely nothing which would indicate that any motion to suppress may have been successful.

Finally, in regards to the sentencing phase of Petitioner's trial, Attorney Turner testified at the habeas hearing that he fully advised Petitioner of his right to tender any mitigating evidence during said sentencing phase. Turner testified that neither Petitioner nor members of his family had given him the names of any persons who would have testified during the sentencing phase of Petitioner's trial. In fact, Petitioner's own mother and sister rejected Turner's requests that they be witnesses on behalf of Petitioner.

In conclusion, claims of effective assistance require an inquiry into the actual performance of counsel, and a determination as to whether reasonably effective assistance was rendered based upon the totality of the circumstances. Lovett v. Florida, 627 F.2d 706 (5th Cir. 1980). Although counsel may have done more, he is not required to pursue every path until be bears fruit or all hope withers. Id., at p. 708; United States v. Hughes, 635 F.2d 449, 453 (5th Cir. 1981). Here, Petitioner has failed to show that under the totality of the circumstances existing at his trial he received ineffective assistance of counsel, and thus, this Court should decline Petitioner's request that certiorari be granted to review his seventh argument.

VIII. THERE IS NO EVIDENCE IN THE RECORD THAT ANY JURORS WERE IMPROPERLY EXCLUDED BECAUSE OF THEIR OPPOSITION TO CAPITAL PUNISHMENT.

Petitioner contends under his eighth argument that the death penalty in this case should be vacated, because of the improper exclusion of two jurors who voiced opposition to capital punishment. These jurors who were excused were Ms. Barbara Weston and Ms. Emma T. Cason (T. 96-99, 128-130). There is no evidence in the record which supports the allegation that these potential jurors had been improperly excluded. Both jurors expressed that they could not impose the death penalty, regardless of the facts or circumstances which might emerge in the course of the proceedings. Therefore, they were properly excluded under Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny, Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); Davis v. Georgia, 429 U.S. 122 (1976).

Petitioner's assertions that the exclusion of the jurors deprived him of a representative cross-section of the community or that the exclusions created a prosecution-prone jury have previously been rejected by the federal courts. See, Spinkellink v. Wainwright, 578 F.2d 582, 593-594 (5th Cir. 1978), cert. den., ___U.S.___, 99 S.Ct. 1548 (1979); Bumper v. North Carolina, 391 U.S. 543 (1968).

For all of the aforesaid reasons, this Court should reject Petitioner's eighth argument which requests that the petition for writ of certiorari be granted.

CONCLUSION

For all of the aforesaid reasons, Petitioner's request for a writ of certiorari should be DENIED.

Respectfully submitted,

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Officer	Race/Age	Date	Perp.	Race/Age	Discription of Crime	Disposition of Perp.
Lee W. Dye	W/M	11-9-60	George Gray	B/M/35	Shot investigating domestic disturbance	Mental Hosp.
[illegible] E. Mundy	B/M	1-5-61	Joe Louis Ross	B/M/25	Shot by burglar in house!	Killed by Offic-Victim
[illegible] Jr.	W/M	5-17-67	Jesse L. Jones	B/M/24	Shot investigating Suspicious Person!	DEATH Sentence
[illegible] BATY	W/M	1-3-70	Woodrow Poock	B/M/27	Shot by Mental Patient at Bus Station	NOT Guilty by Reason of Insanity
[illegible] Taylor	W/M	8-23-71	Ronnie Franklin Mac Callahan	B/M/21 B/M/19	Shot and beaten by burglars!	Guilty - Life Sentence Guilty - Death Sentence
[illegible] Greene	W/M	11-3-71	Unknown		Murdered in Police Vehicle	N/A.
[illegible] Roosevelt	W/M	6-19-72			Investigating Civil disorder in Public	Perp Allegedly Killed
[illegible] Harris	B/M	10-21-73	Kenneth Smith James Carter	B/M/19 B/M/22	Investigating disturbance in Phone Booth	Voluntary Manslaughter Guilty - 10 yrs. to Serve 7 yrs.
[illegible] Jones	B/M	12-11-73	Norman Frank Lee	B/M/23	Shot by burglary suspect in custody	Guilty - Life Sentence Guilty - 10 YEARS
[illegible] White	W/M	7-15-74	Michael Timothy Mack	B/M/18	Shot by Perp. during a Robbery in Progress	Guilty - Life Sentence
[illegible] Gray	W/M	1-7-75	Unknown	B/M	Shot during Motel Robbery attempt	N/A
[illegible] Ivo	W/M	7-23-75	Dan Allison	W/M/20	Perp shot and murdered parents as well as Police Officer; Mental.	NO Disposition
[illegible] Hudson	W/M	4-28-76	Ernest Lewis	B/M/25	Shot by Perp, during Robbery Attempt.	Natural Life
[illegible] Nelson	W/M	9-23-77	Clyde Hunter	B/M/19	Shot by suspect while investigating Sus. Person.	Killed by Police
[illegible] Schlatt	W/M	5-13-79	Warren McKasty	B/M/32	Shot by Perp, during a Robbery in Progress	Guilty - Death Sentence
[illegible] Johnson	B/M	2-17-80	Unknown	B/M	Shot by Perp, during Robbery attempt	N/A
[illegible]	B/M	7-19-80	Glenn Adams Otis Mosley	B/M/20 B/M/21	Shot investigating Robbery Suspects.	NO Disposition

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Appendix A

Petitioner's Reply Brief

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-5408

WARREN McCLESKEY,

Petitioner,

Versus

WALTER ZANT, Superintendent,
Georgia Diagnostic and
Classification Center,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT H. STROUP
1515 Healey Building
57 Forsyth St., N. W.
Atlanta, Georgia 30303

ATTORNEY FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-5408

WARREN McCLESKEY,

Petitioner,

Versus

WALTER ZANT, Superintendent,
Georgia Diagnostic &
Classification Center,

Respondent.

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

Comes now the Petitioner, WARREN McCLESKEY, and files this brief in reply to the Respondent's Brief in Opposition to the Petition for Writ of Certiorari.

I. THE BROAD JURY INSTRUCTIONS LEFT THE JURY WITHOUT GUIDANCE AS TO THE USE OF EVIDENCE OF OTHER ALLEGED CRIMINAL ACTS CONTRARY TO THE STANDARDS OF GREGG V. GEORGIA AND ITS PROGENY.

The Respondent asserts that the trial court below "specifically" instructed the jury relating to its use of the alleged prior criminal acts for which there was testimony from five witnesses at the Petitioner's trial. These "specific" instructions gave the jury no standards regarding their use, either at the guilt or sentencing phase of the trial. The instructions at the sentencing phase were as follows:

> "In arriving at your determination of which penalty shall be imposed, you are authorized to consider all the evidence received here in court, presented by the State and the defendant throughout the trial before you."

(Tr. 1028.)

That is scarcely the kind of "specific" instruction which could properly guide the jury in the exercise of its decision-making power sufficient to comply with Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 858 (1976) and its progeny.

Nor does the guilt-phase instruction regarding the use of various "other acts" testimony provide any meaningful guidance to the jury regarding use of this evidence. Although the prosecution offered the "other acts" evidence to prove the identity of petitioner (Tr. 667), the trial court instructed the jury that the evidence was admitted for the purposes of, inter alia, "illustrating the state of mind, plan, motive, intent and scheme of the accused. . . ." (Tr. 673, quoted in full in Petitioner's Brief, at p. 5).

The jury then was instructed both that the evidence of other acts could be used for purposes beyond which the prosecution itself sought to use the evidence, and further told at the sentencing phase that the evidence could be considered, without any guidance regarding its use.

The gross inadequacy of these instructions (or absence thereof) is reflected in the Georgia Supreme Court's striking down of a portion of the Georgia death penalty statute dealing with the jury's use of evidence of prior convictions. As originally enacted by the Georgia State Legislature, the death penalty scheme provided as an aggravating circumstance for which the death penalty could be imposed:

> "(1) The offense of murder. . .was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions."

Ga. Code Ann. §27-2537(b)(1).

The Georgia Supreme Court found this provision unconstitutional because it was "too vague and non-specific" to be applied evenhandedly. Arnold v. State, 236 Ga. 534, at 540-41 (1976).

It follows that if the language selected by the legislature was too vague and non-specific to assure evenhanded administration of the statute, the absence of any instruction to the jury whatsoever fails to assure even-handed administration.

Furthermore, the instruction at the guilt phase (and lack thereof at the penalty phase) is contrary to principles long recognized in American jurisprudence.[1/]

For these reasons, respondents' position is without merit.

1/ Unlike Georgia, most American jurisdictions have developed strict standards which must be met prior to the evidence of independent criminal conduct being admitted to the jury. Among the safeguards which other jurisdictions generally impose are the following:

(1) The state must make a clear showing of the probative value of the evidence to an element of the crime charged. State v. Hernandez, 437 P.2d 952 (Ariz. 1968); State v. Billstrom, 149 N.W.2d 281 (Minn. 1967); State v. Stevens, 238 N.W.2d 251 (N. Dakota 1975); State v. Watson, 252 N.E.2d 305 (Ohio, 1969); State v. Whalon, 464 P.2d 730 (Wash. 1970); Bullard v. United States, 395 F.2d 658 (5th Cir. 1968); 2 Weinstein's Evidence, ¶404[08];

(2) The evidence will not be admitted if offered for proof of an element of the crime which is not contested, or is duplicative of other evidence on that element. State v. Bly, 523 P. 2d 397 (Kan. 1974); People v. Gay, 104 Cal. Rptr. 812, 28 C.A. 3rd 661 (1972); People v. Flansburgh, 180 N.W.2d 373 (Mich. 1970); Jones v. State, 481 S.W.2d 900 (Tex. 1972); United States v. Fierson, 419 F. 2d 1020 (7th Cir. 1970); 2 Weinstein's Evidence, at 404-45; Fox v. State, 491 P.2d 721 (Nev. 1971).

(3) In cases where the evidence of independent alleged criminal acts is offered to show the identity of the prepetrator of the crime [such as was apparently the case in petitioner's trial herein], a high degree of similarity between the other acts and the act being tried must be shown. State v. Hernandez, supra, n. 6; People v. Romero, 334 N.E.2d 305 (Ill. 1975); State v. Billstrom, supra, n. 6; State v. Stevens, supra, n. 6; Bobo v. State, 324 So.2d 336 (Ala. Court of Crim. App., 1975); State v. Watson, supra, n. 6; Drew v. United States, 331 F.2d 85 (D.C.Cir. 1976); McCormick Evidence, 2d Ed. ¶190 ("The device used must be so unusual and distinctive as to be like a signature.")

(4) The evidence regarding the independent acts must prove criminal conduct of the defendant by clear and convincing evidence or beyond a reasonable doubt. People v. Stanworth, 457 P.2d 889 (Cal. 1969); Nami v. State, 77 S.W.2d 528 (Tex. 1934); State v. Hernandez, supra, n. 6; State v. Billstrom, supra, n. 6; State v.

II. PETITIONER'S STATE HABEAS EVIDENCE DID SHOW THE CAPRICIOUS AND ARBITRARY NATURE OF THE IMPOSITION OF THE DEATH PENALTY.

Respondent argues that petitioner's evidence failed to show that the death penalty was imposed in an arbitrary and capricious manner (Brief, at p. 14). What respondent's recitation of facts cannot ignore, however, is the clear pattern of imposition of the death penalty only when the police officer was white and the defendant was black. This was the pattern under the death penalty statute ruled unconstitutional in Furman v. Georgia, 408 U. S. 238 (1972) and it remains the case under the death penalty scheme currently in effect in Georgia.

Furthermore, petitioner introduced expert testimony which has analyzed the experience in Georgia and several other states and supports the conclusion that the death penalty scheme is being administered in an arbitrary and capricious manner. Therefore, respondent's assertion that petitioner's evidence failed to show an arbitrary and capricious imposition of the death penalty is without merit.

1/ Continued:

Stevens, supra, n. 6; Manning v. Rose, 507 F. 2d 889 (6th Cir. 1974) ("American jurisdictions nearly universally have rules somewhat similar to the Tennessee common law rule allowing 'clear and convincing' evidence of other crimes to establish identity"); United States v. Klemons, 503 F. 2d 486, 490 (8th Cir. 1974).

(5) Evidence of other convictions are admissible only by way of record evidence of the convictions themselves rather than testimony regarding other acts. State v. Stollings, 212 S. E. 2d 745 (W. Va. 1975); Commonwealth v. Connally, 269 A. 2d 390 (Pa. 1970); People v. Castronova, 354 N.Y.S. 2d 250 (N. Y. 1974); State v. Cote, 235 A. 2d 111 (N. H. 1967), cert. denied, 390 U.S. 1025 (1968).

The Georgia rule regarding admissibility of independent acts of criminal activity contains none of these safeguards.

III. STATE HABEAS COURT FOUND EXISTENCE OF AN UNDERSTANDING OF PROMISE TO KEY STATE WITNESS WHICH WAS NOT REVEALED AT PETITIONER'S TRIAL.

The respondent argues that petitioner is incorrect in asserting that the state habeas court found that one of the police detectives involved in the investigation antecedent to petitioner's trial had made a promise of favorable treatment to a key prosecution witness which was not disclosed at petitioner's trial (Respondent's Brief, at 17). However, the State Court's finding is unmistakable:

> "He [one of the key prosecution witnesses] did state that he was told by Detective Dorsey [of the Atlanta Police Bureau] that Dorsey would 'speak a word' for him."

April 8, 1981 Order of the Superior Court of Butts County, attached to Petition for Writ of Certiorari, at A-7.

The "word' being spoken for him was a word to federal authorities who then had an escape charge pending against the witness. The witness understood it to be a promise: ". . .I wasn't promised nothing by the D. A. but the Detective told me that he would - he said he was going to do it himself, speak a word for me. That was what the Detective told me" (Habeas Tr. at 122). Therefore Question #III raised by petitioner in his Petition for Writ of Certiorari is clearly presented by the facts in this case.

IV. THE DENIAL OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS, AND FOR EXPERT WITNESS FUNDS, WHEN THE STATE RELIED HEAVILY UPON THE IDENTIFICATION OF THE UNRECOVERED MURDER WEAPON BY ITS EXPERT IN ORDER TO CONVICT, WAS CONSTITUTIONAL ERROR.

Respondent argues that petitioner's claim that he was denied due process by the trial court's failure to permit him to proceed in forma pauperis and to provide funds for an independent ballistics expert is without merit because the testimony of an independent expert could not have created a reasonable doubt regarding

petitioner's guilt.

This argument, of course, is inconsistent with the State's heavy reliance upon the evidence regarding the identity of the murder weapon as a basis for the imposition of the death penalty in petitioner's case. Even in respondent's Reply Brief filed in this Court, heavy reliance is placed upon the identity of the gun, for proof that petitioner was the "prime mover" in the armed robbery (Respondent's Brief, at p. 15).

The identity of the murder weapon (never recovered) was critical to the State's case, and therefore, the denial of expert witness funds to the petitioner was critical to his ability to adequately conduct a defense. The testimony of the State's own expert at the habeas corpus hearing makes clear that his identification of the murder weapon as a "Rossi" was by no means certain. The evidence that other defendants carried .38 caliber weapons, along with the testimony of certain witnesses that co-defendants were in a position to fire the murder weapon at the time of the shooting, shows the significance of this evidence.

V. JURY INSTRUCTIONS CONTRARY TO SANDSTROM AND MULLANY WERE NOT HARMLESS ERROR.

The respondent argues that the jury instructions given regarding intent (". . .[A] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but both these presumptions may be rebutted. . . ."), were, if erroneous, harmless error. (Respondent's Brief, at 24-25.) The Fifth Circuit has recently held otherwise. In Hammontree v. Phelps, 605 F. 2d 1371, at 1380, (5th Cir. 1980), the Court held that "an unconstitutional jury instruction on an element of the crime can never constitute harmless error." This rule is founded upon this Court's rule in Chapman v. California, 386 U. S. 18, 23 (1967), that "there are some rights so basic to

a fair trial that their infraction can never be treated as harmless error."[2/]

CONCLUSION.

For the foregoing reasons, the questions which petitioner raises in his Petition for Writ of Certiorari are substantial ones, and the Court should grant the writ.

Respectfully submitted,

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2/ The Court's erroneous instructions on "intent" were exacerbated in this case by the Court's broad instructions regarding use of "other acts" evidence - in which the Court told the jury that it could rely upon such other acts evidence as a basis for finding "intent." Both instructions substantially lightened the State's burden to show intent with regard to the crime for which petitioner was tried.